Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

ALVIN J. SANDERS,

Petitioner,

v.

FULTON COUNTY BOARD OF EDUCATION, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

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80 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether lay pro se Litigant can receive equal protection of the United States Constitution.

   A. Whether a United States District Court can ignore its own Rules of Civil Procedure and Rules of Evidence while knowingly basing its ruling upon criminal activity of the Defendants, and uncredible witness.

   B. Whether a United States District Court can knowingly base its ruling upon evidence that clearly violates Plaintiff's rights to due process.

   C. Whether the constitutional rights of Maude Lee Thornbrough are any more important than the constitutional rights of Alvin J. Sanders.

PARTIES TO THE PROCEEDINGS

Parties to the proceedings are as follows:

Alvin J. Sanders, Plaintiff, Appellant, Petitioner
James Fox, Defendant, Appellee, Respondent
John Keegan, Defendant, Appellee, Respondent
James Smith, Defendant, Appellee, Respondent
Fulton County Board of Education, Defendants, Appellees, Respondents
Phillip L. Hartley, Counsel for Defendants, Appellees, Respondents
Martha M. Pearson, Counsel for Defendants, Appellees, Respondents
Harben & Hartley Law Firm, Counsel for Defendants, Appellees, Respondents
Judith A. O'Brien, Counsel for Defendants, Appellees, Respondents
Frank M. Hull, Trial Court Judge
Tjoflat, Chief Judge, Eleventh Circuit
Hatchett, Circuit Judge, Eleventh Circuit
Anderson, Circuit Judge, Eleventh Circuit
National Union Fire Insurance Company of Pittsburgh, Insurer of Defendants, Appellees, Respondents.

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APPENDIX H - Thornbrough v. Columbus and Greenville R. Co. - Facts

I.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit and an Order denying the Petition for Rehearing and Suggestion for Rehearing En Banc are reproduced in the Appendix hereto. The relevant judgment entry and memorandum opinion of the United States District Court are unpublished and are reproduced in the Appendix hereto.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its opinion on August 28, 1996. That Court denied the Petition for Rehearing on January 9, 1997. This Court has jurisdiction under 28 U.S.C. Section 1254(1) and 42 U.S.C. Section 2000e-5. Equitable and other relief are also sought under 42 U.S.C. Section 2000e-5(G). Federal jurisdiction is also conferred on this Court pursuant to U.S.C. Section 1331 and 1343.

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000-e, et seq.; the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Sections 621-624; 42 U.S.C. Sections 1983 and 1988; and the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

Alvin J. Sanders, an African-American male, was first employed by the Fulton County Board of Education in December of 1986 as a Programmer/Analyst, a position within the division of the School District's administrative or "central" offices known as the Department of Management Information Systems (MIS). As

a Programmer/Analyst, Plaintiff's primary responsibilities involved maintaining, upgrading, and developing computer software programs used for managing the financial and other business operations of the School District. This required extensive familiarity with the accounting software system the School District used, the payroll and personnel system, as well as other subsidiary programs which were integrated with those primary software systems.

The first two or three years of Plaintiff's employment were relatively satisfactory. Plaintiff was initially assigned to support the computer program and system used by the School District's warehouse and audio-visual departments. Specifically, as a programmer, Plaintiff was assigned to rewrite the warehouse inventory system program, to "debug" the audio-visual computer systems and to develop a program which would enable the School System to produce its own audio-visual catalog. All other issues are in dispute.

B. PROCEEDING IN THE DISTRICT COURT CASE

Plaintiff, Alvin Sanders, brought this civil rights action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq., and 42 U.S.C. §1983. He alleged that the Defendants failed to offer him a new contract of employment on the basis of his race, sex, and age. He also alleged that Defendants violated the Equal Protection clause and both the procedural and substantive component of the Fourteen Amendment's DUE PROCESS clause, when that decision was made. Plaintiff named as Defendants in his Complaint the Fulton County Board of Eduction and three of its (now former) employees, James Fox, the Superintendent; John Keegan, an Associate Superintendent; and James Smith, Plaintiff's immediate Supervisor, in their individual and official capacities.

The District Court granted Defendants' Motion for Summary Judgment and denied Plaintiff's Motion. The Court held that

Plaintiff had failed to produce any evidence that the decision not to renew his contract of employment was motivated by discriminatory animus of any type -- race, sex, or age. The Court further held that Plaintiff did not have a property interest in continued employment, that the administrative employment procedures used by the School System did not violate the equal protection clause and that the individually named Defendants were entitled to qualified immunity in any event as to Plaintiff's due process and equal protection claims. Accordingly, the Court entered judgment for the Defendants. Plaintiff then filed his Notice of Appeal seeking review of the trial Court's order and judgment in this Court.

C. PROCEEDING IN THE COURT OF APPEALS

Plaintiff appealed the summary judgment. The panel of the Eleventh Court affirmed the Trial Court. Plaintiff filed a Petition for Rehearing in the Court of Appeals with a suggestion for Rehearing En Banc. The request for Rehearing En Banc was denied on January 9, 1997.

REASON FOR GRANTING WRIT

The granting of this Writ of Certiorari will not break any new ground for judicial rulings, but it must be granted in order to reaffirm the Constitutional protection for all citizens, even those that are free and cannot afford an attorney.

Plaintiff naively thought that the fraudulent documents argument would defeat any argument put forth by the Defendants. For some unexplained reasons, the United States District Court for the Northern District of Georgia, Atlanta Division, totally ignored Plaintiff's arguments. The Untied States Court of Appeals, Eleventh Circuit, also chose to avoid Plaintiff's arguments. Neither Court chose to rule on the validity of Plaintiff's arguments. Both Courts chose to rule that Plaintiff failed to make a prima facie case. Now Plaintiff prays to the Supreme Court of the Untied States. Plaintiff prays that the wisdom that went into

the Thornbrough v. Columbus and Greenville R. Co. decision would be applied to the Plaintiff's case.

Plaintiff has submitted to the District Court and the Circuit Court, detailed arguments of perjury by Mrs. Celestine Tory. Plaintiff has also argued that the Defendants submitted fraudulent documents to the EEOC in violation of Title 18 Crimes and Criminal Procedure, Chapter 47 - Fraud and False Statements Section 1001 - Statements or Entries. In support of Plaintiff's arguments, Plaintiff submitted depositions from twenty-eight (28) employees of Fulton County Board of Education. These were people with whom the Plaintiff worked or came in contact with daily. Eight (8) of those employees were co-workers of the Plaintiff and they were listed as witnesses for the defense. In response to the EEOC inquiry, the Defendants stated "Mr. Sanders' contract was not renewed because he consistently performed his work inadequately and had poor interpersonal relationships with the rest of the MIS staff and users of his programs." But when the witnesses were asked if they had a problem with Plaintiff's interpersonal skills, none of them stated that they had problems with Plaintiff's interpersonal skills. The number of employees excluded Mrs. Celestine Tory.

Please note that while reading the District Court's finding, it appears that the only person who might have had a problem with the Plaintiff's interpersonal skill was Mrs. Celestine Tory. Also please note, the District Court ignored Plaintiff's arguments regarding Mrs. Celestine Tory's credibility and the depositions of twenty-eight witnesses.

Plaintiff also submitted 78 documents in support of his arguments. Again, please note the District Court stated, "In addition, Mr. Anderson wrote a memo stating that he had serious reservations about the quality of the Requisition Program Plaintiff was developing." Again, please note the fact that the District Court totally ignored the following evidence submitted by the Plaintiff:

1. An inter-office communication, to Dr. John Keegan, Associate Superintendent for Instruction, from Jere L. Pruett, Executive Director for Purchasing and Supply Services, dated January 11, 1991, Ref: Warehouse Inventory System, which states "on Wednesday, January 10, 1991, I reviewed the program that Alvin Sanders has written to allow the direct entry of warehouse requisitions at user location. I have been well pleased with the work Alvin has done on the entire system and I feel it will work satisfactorily."

2. E-Mail dated 07-18-91 from John Keegan to Alvin Sanders, Celestine Tory, Jim Smith, Subject: On-line Warehouse Implementation Plan, in which Defendant John Keegan states "after the demo of the on-line warehouse system, I asked for an Implementation Plan...".

3. The above E-mail supports Plaintiff's assertion in Plaintiff's Brief that Plaintiff gave a demonstration to the leadership of the MIS Department. The leadership of the MIS Department included Defendant John Keegan, Associate Superintendent; Defendant James Smith, Chief of System Programming; Mr. Walter Matlock, Director Management Information Systems; Mr. Richard C. Brooks, System Analyst/Development; Mr. Randall Cason, Systems Analyst/Support; and Mr. William Childers, Systems Programmer.

4. Inter-Office Memorandum, To: Harold Grindle, From: Jim Smith, Subject: New On-Line Warehouse Requisition Testing, Dated: August 30, 1991, in which Defendant James Smith stated, "Since we haven't heard any negative feedback concerning testing of the new warehouse requisition system, we are proceeding on with the implementation plan as we have scheduled. We assume that B.J. Master and Ed Greene did not find any problems during their testing."

5. E-Mail to Sand - Sanders, Alvin J., From: Walt - Matlock, Walter L., Director Information Systems MIS, Subject: WHS ACCT ADDITION, Dated: 10/31/91, which states, "Alvin,

please add account 726240-6102-A002 to my WHS requisition profile so that I can order using this account along with '6101.' Thanks..."

Please notice that the only qualification given to Mr. Anderson by the District Court was the fact that he was an African-America. In contrast, the above evidence submitted by the Plaintiff showed that Mr. Walter Matlock was the Director of Information Systems; Mr. Jere L. Pruett, Executive Director for Purchasing and Supply Services; Dr. John Keegan, Associate Superintendent for Instruction; Mr. Harold Grindle, Assistant Superintendent of Business Services; Mr. Richard C. Brooks, Systems Analyst/Development; Mr. Randall Cason, Systems Analyst/Support; Mr. William Childers, Systems Programmer; Mr. James Smith, Chief of System Programming; Ms. B.J.Master, Accounting Department; and Mr. Ed Greene, Auditing Department. That is a total of ten people. Ten people with responsibilities that would have been affected by the functionality of the Warehouse Requisition Processing System.

Also, please be informed that all of the ten employees were of European descent.

The Supreme Court of the United States must consider the fact that, if after usage of the system and the testing of the system by the above employees, who would have been affected by the functionality of the Warehouse Requisition System, and if the system still had problems that would cause Mr. Anderson to have "serious reservations" about it, and if none of these employees lost their jobs or were disciplined in any way, and the District Court found this as a basis for the termination of the Plaintiff, then this fact serves as the best evidence of racial discrimination by the Defendants upon the Plaintiff.

From the illustration above and if the Supreme Court of the United States were to read Plaintiff's Response to Defendants' Motion for Summary Judgment - APPENDIX E, Plaintiff's Appeal Order for Final Judgment - APPENDIX F, and Appellant's

Response to Appellee's Brief - APPENDIX G, it would be obvious to the Supreme Court of the United States that the District and Circuit Courts obviously made their decisions without considering the evidence submitted by the Plaintiff.

Now the Plaintiff asks the Supreme Court of the United States "whether a lay pro se litigant can receive equal protection under the United States Constitution?"

To aid the Supreme Court of the United States in answering that question, Plaintiff has embodied the complete ruling of Thornbrough v. Columbus and Greenville Railroad, 760 F2d 633. Thornbrough v. Columbus and Greenville Railroad is a thorough and exhaustive analysis of the Summary Judgment v. Prima Facie case question. Plaintiff simply asks the Supreme Court of the United States to read the following pages and apply the same wisdom found in Thornbrough v. Columbus, et al. to his case.

THORNBROUGH v. COLUMBUS AND GREENVILLE R. CO.

Cite as 760 F.2d 633 (1985)

GOLDBERG, Circuit Judge:
Grow old along with me!
The best is yet to be,
The last of life, for which
the first was made.
—Robert Browning, *Rabbi Ben Ezra* st. 1 (1864)

[1] For many elder Americans, Browning's verse is a cruel jest rather than a reassuring vision. Not only must they face the inexorable advance of nature—they must face the biases of their fellow man. In 1967, recognizing that one of the tests of a civilized society is its treatment of the elderly, Congress enacted the Age Discrimination in Employment Act ("ADEA"), Pub.L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§

621-634 (1982)). The Act has as its purpose the "elimination of discrimination from the workplace," *Lorillard v. Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978), by making it unlawful for employers to discriminate against persons between the ages of forty and seventy based on their age. 29 U.S.C. §§ 623(a), 631.[1]

In February 1983, Maude Lee Thornbrough brought suit against the Columbus & Greenville Railroad, alleging that he had been dismissed because of his age, in violation of the ADEA. The district court held that Thornbrough had failed to present a prima facie case of age discrimination and granted summary judgment for the Railroad. Because we conclude that Thornbrough raised a genuine issue of material fact, we hold that summary judgment was improperly granted. Accordingly, we reverse the judgement below and remand for further proceedings.

I. FACTS (See Appendix H)

II. ELEMENTS OF A PRIMA FACIE EMPLOYMENT DISCRIMINATION CASE

[2] In a disparate treatment suit, the ultimate issue is whether the employer intentionally discriminated against the plaintiff. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1988); *Elliott v. Group Medical & Surgical Service*, 714 F.2d 556, 564 (5th Cir. 1983), *cert. denied*, — U.S. —, 104 S.Ct. 2658, 81 L.Ed.2d 364 (1984). Thus, if a plaintiff is able to offer sufficient direct evidence of intentional discrimination, he obviously should prevail. Usually, however, this is not the case. Unless the employer is a

[1]For a general discussion of the background of the ADEA, *see Williams v. General Motors Corp.*, 656 F.2d 120, 126-27 (5th Cir.1981), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982); Note, *The Age Discrimination in Employment Act of 1967*, 90 Harv.L.Rev. 380 (1976).

latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree. *See* Mendez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 Stan.L.Rev. 1129 (1980). Employers are rarely so cooperative as to include a notation in the personnel file, "fired due to age," or to inform a dismissed employee candidly that he is too old for the job. *See Aikens*, 460 U.S. at 716, 103 S.Ct. at 1482.

[3-5] To ease the evidentiary burdens on employment discrimination plaintiffs, courts have fashioned special rules of proof, in order "progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 8, 101 S.Ct. 1089, 1094 n. 8, 67 L.Ed.2d 207 (1981).[2]

[2]These special rules governing the order of proof were first set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and were later explicated and refined in *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978), *Board of Trustees v. Sweeney*, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978), *Burdine*, 450 U.S. 248, 101 S.Ct. 1089, and *Aikens*, 460 U.S. 711, 103 S.Ct. 1478. Although *McDonnell Douglas* itself was technically a failure to rehire case, not a discharge case, both the Supreme Court and this court have applied the *McDonnell Douglas* rules of proof in discharge cases, *see, e.g., Burdine*, 450 U.S. 248, 101 S.Ct. 1089, *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir.1981), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982); *Price v. Maryland Casualty Co.*, 561 F.2d 609 (5th Cir.1977), as well as in other types of disparate treatment cases, *see generally* B. Schlei & P. Grossman, *Employment Discrimination Law* 1153 & nn. 5-12 (1976).

Moreover, although the special rules of proof developed in *McDonnell Douglas* and its progeny arose in the context of Title VII of the civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-

Initially, a plaintiff can create a rebuttable presumption of intentional discrimination by establishing a "prima facie case." *Burdine*, 450 U.S. at 252-58, 101 S.Ct. at 1093; *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824. Generally, to establish a prima facie case, a plaintiff need only make a very minimal showing. He can meet his initial burden by showing merely that he was within the protected class, that he was qualified for the job in question, and that employees outside of the protected class were more favorably treated—for example, by being hired to a job for which the plaintiff was turned down or by replacing the plaintiff in the job from which the plaintiff was discharged. *See, e.g., McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; *Price*, 561 F.2d at 612.

17 (1982), ever since our maiden ADEA case, *Hodgson v. First Federal Savings & Loan Ass'n.*, 455 F.2d 818 (5th Cir.1972), we have looked to Title VII decisions to interpret the ADEA. Recently, we adopted in the ADEA context both the *McDonnell Douglas* test of a prima facie case, *Price*, 561 F.2d at 612; *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 735 (5th Cir.1977), and the accompanying rules regarding the order and burdens of proof, *Reeves v. General Foods Corp.*, 682 F.2d 515, 520-23 (5th Cir.1982), establishing a prima facie case may not always satisfy plaintiff's burden of production); *Smith v. Farah Mfg. Co.*, 650 F.2d 64, 67 (5th Cir.1981) (burden of persuasion remains at all times on plaintiff). In this respect, we agree with most other circuits that have considered the question. *See Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014-16 (1st Cir.1979); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1396 (3rd Cir.) *cert. denied*, — U.S. —, 105 S.Ct. 592, 83 L.Ed.2d 702 (1984); *Douglas v. Anderson*, 656 F.2d 528, 531-32 (9th Cir.1981); *Schwager v. Sun Oil Co.*, 591 F.2d 58, 60-61 (10th Cir.1979). *But see Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 (6th Cir.1975). Thus, even though the present case is an ADEA rather than a Title VII case, the rules of proof developed in *McDonnell Douglas* and its progeny are controlling.

[6-8] Once an employee has established a prima facie case, the burden of production shifts to the employer. In order to rebut the presumption of intentional discrimination, the employer must articulate "some legitimate, nondiscriminatory reason" why the plaintiff was rejected or someone else was preferred; otherwise, the factfinder is required to find for the plaintiff. *Burdine*, 450 U.S. at 253-54, 101 S.Ct. at 1093-94; *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824.[3]

[9, 10] By articulating legitimate reasons for his decision, the employer rebuts the initial presumption of intentional discrimination created by the plaintiff's prima facie case. The burden of production therefore shifts back to the plaintiff, albeit at "a new level of specificity," to prove that the reasons articulated by the employer are not true reasons but only pretexts. *Aikens*, 460 U.S. at 714-15, 103 S.Ct. at 1481-82 (*quoting Burdine*, 450 U.S. at 255, 101 S.Ct. at 1095); *see also McDonnell Douglas*, 411

[3]Since this is a summary judgment case, we only note in passing that the presumption created by the plaintiff's prima facie case shifts merely the burden of production, not the burden of persuasion. *Burdine*, 450 U.S. at 253-56, 101 S.Ct. at 1093-95; *Sweeney*, 439 U.S. at 24, 25, 99 S.Ct. at 295; *Furnco*, 438 U.S. at 577-78, 98 S.Ct. at 2950; *see* Fed.R.Evid. 301 ("[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.") Thus, even after the plaintiff has established a prima facie case, the employer need not *prove* that he was motivated by legitimate, nondiscriminatory reasons; he must only "articulate" such reasons. *Burdine*, 450 U.S. at 257-58, 101 S.Ct. at 1096. Once the employer has articulated reasons for his decision, it is the plaintiff's burden to prove that these reasons are pretexts.

U.S. at 802-05, 93 S.Ct. at 1824-26.[4] The plaintiff can do this in two ways, "either [1] directly by persuading the court that a discriminatory reason more likely motivated the employer or [2] indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095, *see also Bohrer v. Hanes Corp.*, 715 F.2d 213, 218 (5th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984). The first of these alternatives is the alternative that is always open to the plaintiff in an employment discrimination case: producing "evidence from which a tier of fact might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Elliott*, 714 F.2d at 562. The second, however, depends upon the resurrection of the presumption initially created by the plaintiff's prima facie case. By disproving the reasons offered by the employer to rebut the plaintiff's prima facie case, the plaintiff recreates the situation that obtained when the prima facie case was initially established: in the absence of any known reasons for the employer's decision, we presume that the employer was motivated by discriminatory reasons. As the Court explained in *Furnco*,

> [W]e are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reasons, based his decision on an impermissible consideration such as race.

[4]Because it is relatively easy both for a plaintiff to establish a prima facie case and for a defendant to articulate legitimate, nondiscriminatory reasons for his decision, most disparate treatment cases are resolved at the third stage of the inquiry, on the issue of whether the defendant's reasons are pretextual. *See* B. Schlei & P. Grossman, *supra* note 4, at 1156.

438 U.S. at 577, 98 S.Ct. at 2950. Thus, in our view, unlike Humpty-Dumpty, the employee's prima facie case can be put back together again, through proof that the employer's proffered reasons are pretextual. *See Aikens*, 460 U.S. at 718, 103 S.Ct. at 1483 (Blackmun, J., concurring); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1396 (3rd Cir.), *cert. denied*, — U.S. —, 105 S.Ct. 592, 83 L.Ed.2d 702 (1984).[5]

[5]*Reeves v. General Foods Corp.*, 682 F.2d 515 (5th Cir.1982), is not controlling, since its analysis of the *McDonnell Douglas* framework was superseded by that of the Supreme Court in *Aikens*. *Reeves* held that an employer's articulation of nondiscriminatory reasons permanently dissolves the presumption created by the employee's prima facie case. In order to prevail under *Reeves*, an employee not only had to rebut the employer's proffered reasons by providing that they were pretexts; he also had to "introduce substantial evidence to show that...he had been discriminated against *because of age.*" *Reeves*, 682 F.2d at 523. *Aikens*, however, took a different view of the employee's burden after the employer has articulated nondiscriminatory reasons. In *Aikens*, the Court reversed the lower court for requiring the employee to submit direct affirmative evidence of discriminatory intent. 460 U.S. at 714 n. 3, 717, 103 S.Ct. at 1481 n. 3, 1483. In a concurrence, Justice Blackmun explained that the Court's holding was based on the principle that "the *McDonnell Douglas* framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision." *Id.* at 718, 103 S.Ct. at 1483. Since *Aikens*, we have adopted a similar view. *See Sylvester v. Callon Energy Serv.*, 724 F.2d 1210, 1213 (5th Cir.1984) ("To prevail ..., [plaintiff] was required only to prove that the reasons proffered by the company to justify the discharge were pretexts."): *cf. Elliott*, 714 F.2d at 566 (evidence of discrimination "may take the form of an attempted showing that the reason given by the employer, though facially adequate, was

III. STANDARD OF REVIEW

Under Fed.R.Civ.P. 56(c), summary judgment is proper only if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." In reviewing a motion for summary judgment, "the court must indulge every reasonable inference from [the underlying] facts in favor of the party opposing the motion." *Powers v. Nassau Development Corp.*, 753 F.2d 457, 462 (5th Cir.1985) (*quoting A.T. & T. Co. v. Delta Communications Corp.*, 590 F.2d 100, 101-02 (5th Cir.), *cert. denied*, 444 U.S. 926, 100 S.Ct. 265, 62 L.Ed.2d 182 (1979)); *see also United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962); *Simmons v. McGuffey Nursing Home*, 619 F.2d 369, 371 (5th Cir.1980). The party who defended against the motion for summary judgment must have his allegations taken as true and must receive the benefit of the doubt when his assertions conflict with those of the movant. *E.C. Ernst, Inc. v. General Motors Corp.*, 537 F.2d 105, 108 (5th Cir.1976). *See generally* C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* §§ 2716, 2725 (2d ed. 1983).

[11, 12] In general, summary judgment is an inappropriate tool for resolving claims of employment discrimination, which involve nebulous questions of motivation and intent. *See Hayden v. First National Bank*, 595 F.2d 994, 997 (5th Cir.1979) ("When dealing with employment discrimination cases, ... granting of summary judgment is especially questionable."); *EEOC v. Southwest Texas Methodist Hospital*, 606 F.2d 63, 65 (5th Cir.1979), *cert. denied*, 445 U.S. 928, 100 S.Ct. 1314, 63 L.Ed.2d 761 (1980). Often, motivation and intent can only be proved through circumstantial evidence; determinations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder. In reviewing a case on appeal, it is difficult to

untrue as a matter of fact").

determine what evidence might legitimately sway the factfinder and hence be material. Thus, if any facts are in dispute, summary judgment is generally inappropriate. *Cf. Transource International, Inc. v. Trinity Industries*, 725 F.2d 274 (5th Cir.1984) (summary judgment generally inappropriate in antitrust suits).

IV. VALIDITY OF SUMMARY JUDGMENT

[13-20] The district court granted summary judgment on the ground that Thornbrough failed to present a prima facie case of employment discrimination.[6] In reviewing this holding, we must consider two questions: (1) Did Thornbrough present a genuine issue of fact as to the existence of a prima facie case, and (2) if so, did he present a genuine issue of fact as to whether the reasons articulated by the Railroad for discharging him were pretextual? We hold that Thornbrough presented genuine issues of fact regarding both issues.[7]

[6]Although the district court speaks of Thornbrough not having met his "burden" of "presenting" a prima facie case, we assume that the district court meant that Thornbrough did not raise a genuine issue of material fact as to the existence of a prima facie case. To make out a prima facie case, the plaintiff must prove the necessary elements "by a preponderance of the evidence." *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1094. Even if the plaintiff has not succeeded in meeting this burden of proof, if he has raised a genuine issue of material fact, he should survive summary judgment. Fed.R.Civ.P. 56(c); *accord Locke v. Commercial Union Ins.*, 676 F.2d 205, 208 (6th Cir.1982) (Jones, J., dissenting) ("It is th[e] existence of a genuine issue of fact, not the existence or nonexistence of a prima facie case, which makes the instant grant of summary judgment improper.").

[7]Because we hold that the plaintiff offered sufficient evidence to establish a prima facie case, we only consider in passing whether failure to establish a prima facie case would warrant

A. Prima Facie Case

[21] The necessary elements of a prima facie employment discrimination case are not Platonic forms, pure and unchanging; rather, they vary depending on the facts of a particular case. In *McDonnell Douglas*, when the Supreme Court first articulated the elements of a prima facie case, it recognized that "specification ...

summary judgment. We do note, however, that where, as here, "prima facie case" refers to evidence that creates a legally mandatory, rebuttable presumption that the proposing party should prevail, rather than to evidence that meets a party's burden of production, *Burdine*, 450 U.S. at 254 n. 7, 101 S.Ct. at 1094 n. 7; *see 9 Wigmore on Evidence* §§ 2487, 2494 (J. Chadbourn rev. ed. 1981), there is no inherent relation between the failure to establish a prima facie case and summary judgment. The failure to establish a prima facie case means merely that the plaintiff has failed to establish facts sufficient to create a legally mandatory, rebuttable presumption. It means that the factfinder is not *required* to find in the plaintiff's favor; it does not mean that the factfinder is not *permitted* to find in the plaintiff's favor. A fact may be material for purposes of defeating a motion for summary judgment and yet fail to create a rebuttable presumption. *But cf. Pace v. Southern Ry. Sys.*, 701 F.2d 1383, 1391 (11th Cir.) ("[F]ailure to establish a prima facie case warrants summary judgment."), *cert. denied*, — U.S. —, 104 S.Ct. 549, 78 L.Ed.2d 724 (1983).

Thus, to the extent that the failure to establish a prima facie case warrants summary judgment, this is due not to the logical relation between the doctrines of prima facie case and summary judgment, but to the particular elements of a prima facie *employment discrimination* case. In the employment discrimination context, a prima facie case is established if the plaintiff merely satisfies the standing requirements of the ADEA and presents evidence of differential treatment of younger and older employees. Given these minimal requirements, the failure to establish a prima facie case generally means that there are no material facts at issue.

of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n. 13, 93 S.Ct. at 1824 n. 13.[8] As we later stated, since discrimination exists "in forms as myriad as the creative perverseness of human beings can provide" *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 753-54 (5th Cir.1980), certain specific elements do not constitute "the alpha and omega" of a prima facie ADEA case, *id.* at 753.

In *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir.1981), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982), we modified the *McDonnell Douglas* test in the context of cases that, like the present one, involve a general reduction in an employer's workforce. As we noted, "Reduction-in-force cases are obviously outside the embrace of [*McDonnell Douglas*] since reduction-case plaintiffs are simply laid off and thus incapable of providing the third [*McDonnell Douglas*] element, *i.e.*, actual *replacement* by a younger employee." *Id.* at 128. We therefore elaborated a different standard for reduction-in-force cases, under which a plaintiff must (1) satisfy the standing requirements of the statute by showing that he is within the protected group and that he has been adversely affected—*e.g.*, discharged or demoted—by the employer's decisions; (2) show that he was qualified to assume another position at the time of the discharge or demotion; and (3) produce "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Id.* at 129.

[8] *See also Furnco*, 438 U.S. at 577, 98 S.Ct. at 2949 (The *McDonnell Douglas* test "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination."); *Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 735 (5th Cir.1977) (*McDonnell Douglas* [did] not establish an immutable definition of a prima facie case.").

The principal novelty of the *Williams* test is its third requirement. At first glance, this requirement may seem to represent a considerable heightening of the proof required for a prima facie case. In a non-reduction-in-force suit, the plaintiff must make only a very minimal showing to establish this aspect of his prima facie case:[9] He must simply show that he was discharged from a position for which he was qualified, and that he was replaced by someone outside of the protected class. *Price v. Maryland Casualty Co.*, 561 F.2d 609, 612 (5th Cir.1977).[10]He need not introduce any evidence, either direct or circumstantial, that the employer in fact engaged in intention discrimination; instead, discrimination is presumed from his replacement. By contrast, under the *Williams* version of a prima facie case, the plaintiff must "produce some evidence that an employer has not treated age neutrally, but has instead discriminated based upon it. Specifically, the evidence must lead the factfinder reasonably to conclude either (1) that the defendant consciously refused to consider retaining or relocating a plaintiff because of his age, or (2) that defendant regarded age as a negative factor in such consideration." 656 F.2d at 129-30.

Williams, however, does not answer the crucial question: What quantum of evidence might lead the factfinder reasonably to

[9]*See Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 562 (5th Cir.1983) (the elements of a prima facie case "come to little more than establishing the standing requirements of the ADEA and blunting the defendant's probably rejoinder that the plaintiff has not been discriminated against"), *cert. denied*, — U.S. —, 104 S.Ct. 2658, 81 L.Ed.2d 364 (1984).

[10]In certain instances, we have relaxed this test even further. For example, in *Wilson v. Sealtest Foods Div. of Kraftco Corp.*, 501 F.2d 84 (5th Cir.1974), we reversed a directed verdict in favor of the employer, even though the plaintiff was replaced simply by a younger person, not by a person outside of the protected class. *See infra* note 14.

conclude that the defendant has not treated age neutrally? Or, put differently, what quantum of evidence is sufficient to create a presumption of intentional discrimination? By failing to specify what evidence is and is not sufficient, it is ambiguous whether *Williams* represents a stricter or merely a more flexible standard for a prima facie case. An argument could be made that *Williams* eased rather than heightened the burden on employment discrimination plaintiffs by eliminating the necessity of showing actual replacement by a younger worker; instead, *Williams* allows employees to establish a prima facie case through any type of circumstantial evidence that younger employees were more favorably treated than older employees.

In examining whether Thornbrough alleged a prima facie case, we note at the outset what Thornbrough did not attempt to prove. He did not attempt to prove that the Railroad's officers made any remarks indicating that age was a factor in their employment decisions. In his deposition, he admitted that no one ever told him that he was too old for the job. Thornbrough Deposition at 50. He did not introduce any statistical evidence that the Railroad tended to disfavor older employees. Indeed, what little statistical evidence there was indicated the reverse: The overall effect of the Railroad's lay-offs was to increase the average age of its work-force from thirty-six to thirty-nine. record at 22. Finally, Thornbrough did not present much, if any, evidence that the Railroad's general employment practices tended to discriminate against older employees.[11]

[11]Thornbrough does not seem to have alleged that the Railroad fired him in part because he received a higher salary than that of the younger employees who were retained. Because we hold that Thornbrough's other allegations are sufficient to forestall summary judgment, we express no opinion about whether Thornbrough raised a genuine issue of fact either as to whether the Railroad based its employment decisions on the relative salaries of different employees, or as to whether, if so, this had a disparate impact and hence violated the ADEA. *Cf. Geller v. Markham*, 635 F.2d

[22-24] Instead, the only evidence offered by Thornbrough in support of his claim of age discrimination was that several younger, allegedly less well-qualified employees were retained during the Railroad's reduction-in-force, and that, at the time of his discharge, two younger, allegedly less well-qualified employees were hired. Record at 4, 31-33; Thornbrough Deposition at 48-49.[12] In our view, these allegations, limited though they are, are

1027, 1032-34 (2d Cir.1980) (basing hiring decisions on relative starting salaries may have disparate impact), *cert. denied*, 451 U.S. 945, 101 S.Ct. 2525, 2531, 73 L.Ed.2d 130 (1982) (elements of disparate impact case).

[12]Although Thornbrough compared his treatment not merely to employees outside of the protected ADEA class, but also to employees within the protected class, this is not decisive. We have never demanded rigid adherence to the requirement that the plaintiff establish that he was treated unfavorably as compared with people outside of the protected class—*i.e.*, under age forty. For example, in *Wilson v. Sealtest Foods Div. of Krafico Corp.*, 501 F.2d 84 (5th Cir.1974), we reversed a directed verdict in favor of the employer, even though the plaintiff was replaced simply by someone younger, not by someone outside of the protected ADEA class. *Id.* at 86. As we noted in *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir.1980), *Id.* at 754; *see also McCuen v. Home Ins. Co.*, 633 F.2d 1150, 1151-52 (5th Cir.1981) (summary judgment reversed even though the younger employees who were retained were over forty years of age). Moreover, in the present case, although several of the retained or new employees with whom Thornbrough compares his treatment may have been within the protected class, at least two clearly were not: the Railroad's Accountant, who was approximately thirty years old in 1982, and the newly-promoted Vice President of Transportation, who was in his early thirties.

sufficient to support a prima facie case.[13] They exude that faint aroma of impropriety that is sufficient to justify requiring the Railroad to give reasons for its decision.[14]

[25] A prima facie case raises an inference of discrimination only because we presume [the employer's] acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco*, 438 U.S. at 577, 98 S.Ct. at 2949-50. In a reduction-in-force case, what creates the

[13]In regard to the other requirements of a prima facie case, the Railroad does not appear to dispute that Thornbrough was within the protected age group and was adversely affected by the Railroad's decision to fire him. Moreover, for the purposes of reviewing the grant of summary judgment, we assume that Thornbrough was qualified for the positions occupied by the retained and new employees, since there are facts in the record to support this conclusion.

[14]The only other ground given by Thornbrough for his claim of age discrimination was that he could think of no other reason why he was fired. Thornbrough Deposition at 48. This argument need not detain us. On previous occasions, we have held that similar arguments are insufficient to support a claim of age discrimination. *See Elliott*, 714 F.2d at 564, 566-67; *Simmons v. McGuffey Nursing Home*, 619 F.2d 369, 371 (5th Cir.1980). In effect, Thornbrough is asking the Railroad to justify its decision. Under the *McDonnell Douglas—Williams* test, however, the employer is not required to articulate legitimate, nondiscriminatory reasons for its employment decision until after the employee has established a prima facie case. By itself, Thornbrough's subjective and conclusory allegation that he was the victim of age discrimination is insufficient to establish a prima facie case. *See Elliott*, 714 F.2d at 567 ("We are not prepared to hold that a subjective belief of discrimination, however genuine, can be the basis of judicial relief.")

presumption of discrimination is not the discharge itself, but rather the discharge coupled with the retention of younger employees. Unlike in an ordinary discharge case, where the mere discharge creates a presumption of discrimination because we assume that an employer does not fire a qualified employee, in a reduction-in-force case, discharges are readily explicable in terms of the employer's economic problems. Consequently, the fact that qualified, older employees are laid off is not inherently suspicious and does not in itself warrant shifting the burden of production to the employer to justify his actions. *Cf. Matthews v. Allis-Chalmers Corp.*, 35 Fair Empl.Prac.Cas. (BNA) 1404, 1405 (N.D.Ill.1984).

Instead, what is suspicious in reduction-in-force cases is that the employer fired a qualified, older employee but retained younger ones. If we focus not on why employees, in general, were discharged, as the district court did, but instead on why the plaintiff rather than another employee was discharged, the discharge of an older employee rather than a younger one is initially unexplained. Under these circumstances, requiring the employer to articulate reasons for his decision to fire the plaintiff is appropriate. It serves the primary function of the prima facie case doctrine: "to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. at 255 n. 8, 101 S.Ct. at 1094 n. 8.

We note that this conclusion is consistent with the approach taken by several other circuit courts. In *Coburn v. Pan American World Airways*, 711 F.2d 339 (D.C. Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 488, 78 L.Ed.2d 683 (1983), for example, the District of Columbia Circuit held that in a reduction-in-force suit, an employee can establish a prima facie case merely by proving that, while he was fired from a job for which he was qualified, "younger persons were retained and others later promoted." *Id.* at 343. In support of this conclusion, the court stated, "We believe the exigencies of a reduction-in-force can best be analyzed at the stage where the employer puts on evidence of a nondiscriminatory reason for the firing." *Id.* Similarly, in

Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 348, 78 L.Ed.2d 314 (1983), the Third Circuit stated that "a plaintiff alleging a discriminatory layoff need show only that he is a member of the protected class and that he was laid off from a job for which he was qualified while others not in the protected class were treated more favorably." *Id.* at 118. The court held that the plaintiff had established a prima facie case by proving that while he was laid off, a younger persons outside of the protected class was retained. *Id.; see also Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395 n. 2 (3rd Cir.) (plaintiff "established a prima facie case by proof that he was discharged while ... a younger employee was retained"), *cert. denied*, — U.S. —, 105 S.Ct. 592, 83 L.Ed.2d 702 (1984). Finally, the Fourth Circuit held in *EEOC v. Western Electric Co.*, 713 F.2d 1011 (4th Cir.1983), that an employee can demonstrate unequal treatment by proving that he was demoted and a younger person in the same position was retained. *Id.* at 1015.[15]

[26, 27] The conclusion that we reach is also supported by our approach in non-reduction-in-force cases. Although we require more than a conclusory allegation of age discrimination to establish a prima facie case, *see EEOC v. Exxon Shipping Co.*, 745 F.2d 967, 976 (5th Cir.1984); *cf. Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1218 (7th Cir.1980), *cert. denied*, 450 U.S. 959, 101 S.Ct. 1418, 67 L.Ed.2d 383 (1981), we do not require much more. Generally, we demand only that a plaintiff present some evidence of differential treatment between older and younger employees. If a younger employee was promoted, but an older employee in a similar position was not, or if a younger employee was hired in preference to an older one, this creates a

[15]Although the Sixth Circuit held to the contrary in *Sahadi v. Reynolds Chem. Corp.*, 636 F.2d 1116, 1118 (6th Cir.1980), that case is inapplicable here since the Sixth Circuit, unlike this court, has declined to extend the *McDonnell Douglas* test to ADEA suits. *See Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir.1975).

presumption of discrimination.[16] We do not require the plaintiff initially to provide any additional evidence of discrimination. Nor is the fact that the employer cannot promote every employee, or that he cannot hire every applicant, decisive. Instead, we are concerned with why the younger employee was promoted, or the younger applicant hired, rather than the older one. Similarly, in reduction-in-force cases, the fact that the employer cannot retain every employee is not conclusive. The question is why, given the employer's need to reduce his workforce, he chose to discharge the older rather than the younger employee. By shifting the burden of production to the employer, this is the question that we hope to answer.[17]

[16]*See Exxon Shipping*, 745 F.2d at 972 n. 3 (prima facie case established by evidence that plaintiff not promoted to position for which she was qualified, while person outside of protected class was promoted); *Page v. U.S. Indus.*, 726 F.2d 1038, 1055 (5th Cir.1984) (same); *Martinez v. El Paso County*, 710 F.2d 1102, 1104 (5th Cir.1983) (plaintiff established prima facie case by showing that he was discharged from job for which he was qualified, while person with comparable or lesser qualifications was retained); *Causey v. Ford Motor Co.*, 516 F.2d 416, 422-23 (5th Cir.1975) (prima facie case established by evidence that male applicants hired to job for which plaintiff applied and was qualified).

[17]In holding that the plaintiff has met his burden of establishing a prima facie case, and that therefore summary judgment was improperly granted, we do not mean to belittle the salutary function of summary judgment in the employment discrimination arena: summary judgment allows patently meritless cases to be nipped in the bud, before valuable judicial resources are expended. Where there is only an "attenuated possibility that a jury would infer a discriminatory motive" *Pace v. Southern Ry. Sys.*, 701 F.2d 1383, 1391 (11th Cir.), *cert. denied*, — U.S. —, 104 S.Ct. 549, 78 L.Ed.2d 724 (1983), proceeding with a case serves no

B. Pretext

[28] Although we reject the district court's holding that the plaintiff failed to allege sufficient facts to establish a prima facie case, the Railroad urges that summary judgment is nevertheless warranted. A prima facie case raises only a *rebuttable* presumption of discrimination. If the employer articulates legitimate, nondiscriminatory reasons for his actions, the presumption created by the plaintiff's prima facie case dissolves and the burden reverts to the plaintiff to prove that the employer's

useful function. The problem, however, is that there is no bright line demarcating when a "genuine issue of fact" degenerates into an "attenuated possibility." Consequently, our cases display no clear pattern. *Compare McCuen v. Home Ins. Co.*, 633 F.2d 1150 (5th Cir.1981) (summary judgment reversed, where plaintiff alleged only that while he was laid off, several younger employees were retained, and where employer had articulated legitimate, nondiscriminatory reasons for its actions) *and Wilson v. Sealtest Foods Div. of Kraftco Corp.*, 501 F.2d 84 (5th Cir.1974) (directed verdict in favor of employer reversed where plaintiff alleged simply that he was forced to retire from job for which he was qualified, and that younger employee who was retained replaced him) *with Stendebach v. CPC Int'l., Inc.*, 691 F.2d 735, 738 (5th Cir.1982) (directed verdict affirmed on ground that employee's evidence was, "at best, a mere scintilla which is insufficient to present a jury question"), *cert. denied*, 461 U.S. 944, 103 S.Ct. 2122, 77 L.Ed.2d 1302 (1983) *and Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458 (5th Cir.1982) (summary judgment affirmed in reduction-in-force case on ground that employee presented no statistical or direct evidence of intentional discrimination) *and Williams*, 656 F.2d at 130 (finding of intentional discrimination reversed on ground that plaintiff failed to establish a prima facie case). In the present case, although the plaintiff's odds of prevailing may not be high, we are not prepared to say that they are so minute that proceeding with the case would be pointless.

reasons are pretextual. *Burdine*, 450 U.S. at 253-55, 101 S.Ct. at 1093-94. According to the Railroad, Thornbrough failed to meet this burden because he was unable to rebut the Railroad's articulated reasons for furloughing Thornbrough rather than another employee. The Railroad claims, therefore, that summary judgment was justified.[18]

[18]The Railroad also cites undisputed statistical evidence indicating that it did not engage in age discrimination. This evidence shows that, as a result of the Railroad's reduction in force, the average age of its employees increased. While this evidence is probative of the age discrimination issue, it is not dispositive. The issue in this case is whether the Railroad discriminated against Thornbrough, not whether it discriminated against other older employees. "It is clear that Congress never intended to give an employer license to discriminate against some employees ... merely because he favorably treats other members of the employees' group.... [I]rrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiff's group can be 'of little comfort to the victims of ... discrimination.'" *Connecticut v. Teal*, 457 U.S. 440, 455, 102 S.Ct. 2525, 2535, 73 L.Ed.2d 130 (1982) (*quoting International Bhd. of Teamsters v. United States*, 431 U.S. 324, 342, 97 S.Ct. 1843, 1858, 52 L.Ed.2d 396 (1977)); *cf. Cooper v. Federal Reserve Bank*, — U.S. —
, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984) (adverse judgment in class action suit not res judicata in subsequent suit by individuals, since employer may have committed individual acts of discrimination without engaging in general pattern of discrimination). As the Court put it in *Cooper*, "a piece of fruit may well be bruised without being rotten to the core." — U.S. —, 104 S.Ct. at 2802. Moreover, the fact that the Railroad retained many older employees does not prove that the Railroad did not regard age as a negative factor; perhaps these older employees were so far superior to their younger colleagues that, even though their age was regarded as a disadvantage, the Railroad did not

[29, 30] We disagree. In the context of a summary judgment proceeding, the question is not whether the plaintiff proves pretext, but rather whether the plaintiff raises a genuine issue of fact regarding pretext. Here, Thornbrough did so. Although the Railroad offered a number of reasons for its decision to fire Thornbrough, Thornbrough questioned the objective truth of each of them.[19] The Railroad claimed that Thornbrough was a less effective worker than the other employees in question—that he was not a "self-starter"; in response Thornbrough argued that he was an experience and effective worker, and that several of the employees retained or hired by the Railroad were extremely inexperienced. Record at 31-33; Thornbrough Deposition at 47-49. The Railroad claimed that Thornbrough was unqualified for several of the positions held by the employees who were retained (for example, the accountant's position and the position of securing industrial development prospects and business); Thornbrough claimed that, with his experience in the railroad industry, he could have filled virtually any position in the Railroad. Record at 33; Thornbrough Deposition at 47. The Railroad claimed that Thornbrough's position was not full-time and was more easily divisible than those of the other employees; Thornbrough responded that his job was full-time. Record at 31.[20]

want to discharge them. Thus, the Railroad's statistical evidence does not warrant summary judgment. Instead, it should be weighed by the factfinder along with the other evidence presented by the parties.

[19]The present case thus differs from *Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 566 (5th Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 2658, 81 L.Ed.2d 364 (1984), where no issue of pretext was raised.

[20]Despite the sparseness of proof in favor of Thornbrough, we are unwilling to say that the disputes raised by Thornbrough are not genuine. Here we are not faced merely with the conclusory allegation of Thornbrough that he was well qualified for his job.

[31] These disputed factual issues are clearly material. Although the Railroad makes much of Thornbrough's lack of affirmative proof of discrimination, Thornbrough is not required to prove that the Railroad was motivated by bad reasons; he need only persuade the factfinder that the Railroad's purported good reasons were untrue. *See Sylvester v. Callon Energy Serv.*, 724 F.2d 1210, 1213 (5th Cir.1984). While Thornbrough's case would be considerably stronger if he could point to a smoking personnel file, if he can undermine the Railroad's articulated reasons, the factfinder would be entitled to conclude that the Railroad engaged in intentional discrimination.[21]

Cf. EEOC v. Exxon Shipping Co., 745 F.2d 967, 976 (5th Cir.1984) ("[P]retext cannot be established by mere 'conclusory statements' of a plaintiff who feels he has been discriminated against."). Instead, according to Thornbrough's counsel, if Thornbrough's presentation of proof had not been abruptly terminated by the summary judgment, Thornbrough was prepared to present witnesses who would have testified as to his qualifications and abilities. Moreover, if the case had continued, Thornbrough could have cross-examined the retained and new employees about their qualifications. Through this comparison of his qualifications with those of his "competitors," Thornbrough may have been able to persuade the factfinder that he was the clearly superior employee. *Cf. Causey v. Fort Motor Co.*, 516 F.2d 416, 423 (5th Cir.1975) (where employer alleges that he hired one employee rather than another because, in his subjective view, the chosen employee was better qualified, court should scrutinize this explanation very carefully); *Pond v. Braniff Airways, Inc.*, 500 F.2d 161, 166 (5th Cir.1974) (same).

[21]*See, e.g., Exxon Shipping*, 745 F.2d at 974-77 (affirmed finding of pretext where plaintiff was denied promotion even though clearly less-qualified person was promoted); *Martinez v. El Paso County*, 710 F.2d 1102, 1104-05 (5th Cir.1983) (affirmed finding of pretext based on testimonial evidence that discharged

[32] Of course, the issue in this case is not whether Thornbrough or the retained employees were better qualified. The Railroad is entitled to make that decision for itself. The ADEA was not intended to be a vehicle for judicial second-guessing of business decisions, nor was it intended to transform the courts into personnel managers. *See Elliott*, 714 F.2d at 567. However, if the factfinder determines that Thornbrough was clearly better qualified than the employees who were retained, it is entitled to conclude that the Railroad's articulated reasons are pretexts.[22] Everyone can make a mistake—but if the mistake is large enough, we may begin to wonder whether it was a mistake at all.

V. CONCLUSION (THORNBROUGH)

In *Williams v. General Motors*, we enunciated the general principle that the ADEA "does not place an affirmative duty upon an employer to accord special treatment to members of the protected age group;" it only "mandates that an employer reach employment decisions without regard to age." 656 F.2d at 129. We recognize that this decision stretches this principle to its limit. By allowing an employee to bring suit merely because an employer fires him rather than a younger, allegedly less well-qualified employee, we may, to some degree, induce employers to lay off younger employees instead of older ones.

However, we are unwilling to embrace the alternative. We are unwilling to hold that even if an older employee can prove that he was clearly better qualified than younger employees who were kept on, he is precluded as a matter of law from bringing an age

employee was clearly better qualified than retained employee).

[22] *Cf. Burdine*, 450 U.S. at 259, 101 S.Ct. at 1097 ("The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this [evidence] may be probative of whether the employer's reasons are pretexts for discrimination.").

discrimination suit. Such a ruling would go far toward shielding a clever employer from the reach of the ADEA. Given the difficulties of demonstrating age discrimination, we believe that the better course is to allow the factfinder to determine whether the plaintiff's evidence justifies an inference of age discrimination.

In *Simmons v. McGuffey Nursing Home*, 619 F.2d 369 (5th Cir.1980), we upheld a grant of summary judgment, noting, "The possibility of a jury drawing a contrary inference sufficient to create a dispute as to a material fact does not reefy to the point even of a thin vapor capable of being seen or realized by a reasonable jury." *Id.* at 371. Here, through the dim mists, we perceive a thin vapor. Whether it will precipitate into a victorious shower is a question for the jury. It should not have been dispersed by means of summary judgment.

REVERSED AND REMANDED.

CONCLUSION (SANDERS)

In the Thornbrough case, the Court ruled that, "...Thornbrough is not required to prove that the railroad was motivated by bad reason; he need only persuade the factfinder that the railroad's purported good reasons were untrue."

Plaintiff has presented evidence to the District and Circuit Courts that Defendants' purported good reason was not only untrue, but the reason was based upon perjured testimony, and the submission of fraudulent documents to the EEOC and the District Court is a criminal act.

Plaintiff now asks the Supreme Court of the United States: Whether the Constitutional rights of Maude Lee Thornbrough are more important than the Constitutional rights of Alvin J. Sanders?

Plaintiff prays that the answer is no. Plaintiff also respectfully prays that this Court will grant its Application for a Writ of Certiorari.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-8544

ALVIN J. SANDERS,

Plaintiff-Appellant,

v.

FULTON COUNTY BOARD OF EDUCATION, (school board); JAMES FOX, individually and in his official capacity as Superintendent for the Fulton County School System; JAMES SMITH; JOHN KEEGAN, individually and in his official capacIty as Assistant Superintendent for the Fulton County School System; ZENDA J. BOWIE; et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion - August 28, 11th Cir., 1996 ___ F.2d ___).

Before: TJOFLAT, Chief Judge, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having

requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

ENTERED: January 9, 1997

BY: Miguel J. Cortez, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-8544
Non-Argument Calendar

D.C. Docket No. 1:93-CV-1668

ALVIN J. SANDERS,

Plaintiff-Appellant,

v.

FULTON COUNTY BOARD OF EDUCATION (SCHOOL BOARD); JAMES FOX, individually and in his official capacity as Superintendent for the Fulton County School System; JAMES SMITH; JOHN KEEGAN, individually and in his official capacity as Assistant Superintendent for the Fulton County School System; ZENDA J. BOWIE; MICHAEL T. RAST; FRANK C. LAMBERT; EDWARD E. LEWIS; SANDI A. MALONEY; DELORES G. McGHEE; BARBARA S. DUFFY; KAREN J. WEAVER; JEANNETTE BRAINE-SPERRY; LINDA P. BRYANT; JANET E. FORBES; VICKI F. HANSBERGER, Members in their personal and official capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

Before TJOFLAT, Chief Judge, HATCHETT and ANDERSON, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 28, 1996

For the Court:
Miguel J. Cortez, Clerk

By: _____
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-8544
Non-Argument Calendar

D.C. Docket No. 1:93-CV-1668-FMH

ALVIN J. SANDERS,

Plaintiff-Appellant,

v.

FULTON COUNTY BOARD OF EDUCATION (SCHOOL BOARD); JAMES FOX, individually and in his official capacity as Superintendent for the Fulton County School System; JAMES SMITH; JOHN KEEGAN, individually and in his official capacity as Assistant Superintendent for the Fulton County School System; ZENDA J. BOWIE; MICHAEL T. RAST; FRANK C. LAMBERT; EDWARD E. LEWIS; SANDI A. MALONEY; DELORES G. McGHEE; BARBARA S. DUFFY; KAREN J. WEAVER; JEANNETTE BRAINE-SPERRY; LINDA P. BRYANT; JANET E. FORBES; VICKI F. HANSBERGER, Members in their personal and official capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

Before TJOFLAT, Chief Judge, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM:

Alvin J. Sanders appeals the district court's grant of appellees' motion for summary judgment. He argues that: (1) the district court erred in its determination that he failed to make out a prima facie case of age or race discrimination; (2) appellees submitted fraudulent documents in support of their motion for summary judgment; and (3) the district court erred in its determination that his motion to compel was moot.[1] We affirm.

Sanders, an African-American male, age 51 at the time he filed his complaint, had been an employee of the Fulton County Board of Education (the "Board). In 1992, the Board elected not to offer Sanders a new employment contract; thus, Sanders' employment was terminated. Sanders' subsequent federal suit complained that his employment was terminated on the basis of his age and race, and also in violation of his procedural due process rights. He alleged claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e, the Age Discrimination in Employment Act of 1967 ("ADEA"), 19 U.S.C.A. § 621 et seq., 42 U.S.C.A. § 1983, the Fourteenth Amendment, and 42 U.S.C.A. § 1981.

This Court reviews the district court's grant of summary judgment de novo, applying the same legal standards employed by

[1] Sanders raises numerous other issues in his brief which merit no further discussion.

the district court. Parks v. City of Warner Robins, Georgia, 43 F.3d 609,612-13 (11th Cir. 1995) (citation omitted). Summary judgment is appropriate where there exist no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In making this determination, we construe evidence in the light most favorable to the nonmoving party below, i.e., Sanders. See Rollins v. TechSouth, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987).

Sanders does not contest the district court's determination that he produced no direct evidence of discriminatory intent. Thus, as the district court pointed out, he must prove discrimination with circumstantial evidence. In order to make out discriminatory intent based on circumstantial evidence, plaintiff must first prove a "prima facie" case of discrimination under the framework established in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981).[2] See Lee v. Russell County Bd. of Ed., 684 F.2d 769, 773 (11th Cir. 1982). If he is able to do so, the burden of production shifts to defendant to "articulate a legitimate, nondiscriminatory reason" for the employment decision. Id. If defendant comes forward with such a reason, plaintiff must demonstrate that the asserted reason was a pretext for discrimination. See Id.

Sanders' argument regarding the allegedly fraudulent documents proffered by the appellees in support of their motion for summary judgment, is in effect, an argument that appellees'

[2] The analysis set forth by the Supreme Court for use in Title VII cases involving claims of intentional discrimination has been adopted by this Court for discrimination cases arising under the ADEA, see Grigsby v. Reynolds Metals Co., 821 F.2d 590, 594 (11th Cir. 1987), and under Section 1983. Lee v. Russell County Bd. of Ed., 684 F.2d 769, 773 (11th Cir. 1982). See generally Burns v. Gadsden State Community College, 908 F.2d 1512, 1518 n.8 (11th Cir. 1990).

legitimate, nondiscriminatory reasons for not renewing his employment contract were pretextual. Based on these documents, he argues that there exists a genuine issue of material fact on the issue of pretext.

We need not reach this issue, however, because the district court found that Sanders failed to make out even the prima facie case. A plaintiff makes out a prima facie case for discrimination by showing that: (1) he belongs to a protected class; (2) he was qualified for the position which he held; and (3) he was discharged and replaced by a person outside the protected class or was discharged while a person outside the protected class with equal or lesser qualifications was retained. Lee v. Russell County Bd. of Ed., 684 F.2d 769, 773 (11th Cir. 1982). The district court held that Sanders failed to make out a prima facie case because he failed to show that other, similarly situated employees were treated differently. Sanders failed to identify any white or younger employee who was retained in a comparable position with equal or lesser qualifications. Sanders makes a number of conclusory allegations as to other employees; however, he fails to present evidence of the precise positions which they held, their qualifications, and any misconduct they may have committed. Thus, we affirm the district curt's determination that Sanders failed to sufficiently establish his prima facie case for the reasons stated in its order.

As to Sanders' argument regarding the district court's disposition of his motion to compel production of certain documents, he failed to raise any of these documents before the district court and, accordingly, is barred from raising them for the first time on appeal. See Nappier v. Allstate Ins. Co., 961 F.2d 168, 170 (11th Cir. 1992) (citation omitted). Sanders does not argue otherwise.

Finally, Sanders raises a number of issues in his statement of issues which are not addressed in his briefs. Accordingly, we deem these issues abandoned on appeal. See Cheffer v. Reno, 55 F.3d 1517, 1519 n.1 (11th Cir. 1995) (issues not argued in brief

deemed abandoned); see also Fed.R.App.P. 28(a)(5). However, mindful of the liberality with which we view pro se briefs, see Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 596 (1972); McBride v. Sharpe, 25 F.3d 962, 971 (11th Cir.) cert. denied, _ U.S. __, 115 S.Ct. 489 (1994), we have reviewed the entirety of the district court's order granting summary judgment and find no error.

Accordingly, for the foregoing reasons, the order of the district court is

AFFIRMED.[3]

[3] Appellant's request for oral argument is denied.

APPENDIX D
ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA FILED MARCH 30, 1995

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 1:93-CV-1668-FMH

ALVIN J. SANDERS,

Plaintiff-Appellant, Cross-Appellee,

v.

FULTON COUNTY BOARD OF EDUCATION, JAMES FOX, JAMES SMITH, JOHN KEEGAN, ZENDA J. BOWIE, MICHAEL T. RAST, FRANK C. LAMBERT, EDWARD E. LEWIS, SANDI A. MALONEY, DELORES G. MCGHEE, BARBARA S DUFFY, KAREN J. WEAVER, JEANNETTE BRAINE-SPERRY, LINDA P. BRYANT, JANET E. FORBES, VICKIE F. HANSBERGER, in their individual and official capacities,

Defendants-Appellees, Cross-Appellants.

ORDER

This matter is before the Court on Plaintiff's Motion for Summary Judgement [29-1] and Defendants' Motion for Summary Judgment [30-1]. Plaintiff, who is proceeding pro se,[1] filed this Complaint on July 23, 1993, alleging claims under Title VII, the Age Discrimination in Employment Act ("ADEA"), 42 U.S.C. § 1983, the Fourteenth Amendment, and 42 U.S.C. § 1981. After reviewing the record in its entirety, the Court finds as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, an African-American male, age 51 at the time of this Complaint, was hired by the Fulton County Board of Education in December, 1986, as a Programmer/Analyst in the Management Information Systems ("MIS") Division. Plaintiff's primary responsibilities included maintaining, upgrading, and developing computer software programs for managing the financial and other business operations of the school district. Although the Programmer/Analyst position did not require a teaching certificate, Plaintiff and other employees in the MIS Division did receive written contracts of employment each year, beginning July 1 and ending June 30 of the following year. Plaintiff's last contract of employment expired on June 30, 1992, and Plaintiff was not offered a contract for the following year.

During his first few years in the MIS division, Plaintiff was assigned to rewrite the warehouse inventory system program, to "de-bug" the audiovisual computer systems, and to develop a program to enable the school system to produce its own audiovisual catalog. On July 31, 1990, Defendant Keegan assigned Plaintiff to the warehouse requisition processing system

[1] Plaintiff was represented by counsel at the time of the filing of his original Complaint on July 23, 1993. However, Plaintiff's counsel withdrew on March 25, 1994, and Plaintiff then proceeded pro se.

project. The purpose of this project was to develop and to implement a program in which individual PCs at each school would be able to communicate directly with the warehouse inventory system program. Two years later, the implementation of this project was not completed. Defendants Keegan and Smith thought that this was at least one year longer than was necessary to complete the project. Defendants state that during the two years in which Plaintiff worked on the project, Plaintiff was unwilling to take responsibility for the problems encountered in developing the program and had difficulty getting along with his fellow workers. Defendants also state that the program, once fully developed, contained numerous errors and was not "user friendly."

In August, 1990, Plaintiff's supervisor, Mr. Bower, completed Plaintiff's evaluation. The evaluation noted problems in the area of interpersonal skills,but identified other skills as "good" and "excellent." In May 1991, Dr. Keegan completed Plaintiff's evaluation. The evaluation gave Plaintiff's overall performance as "satisfactory," but gave Plaintiff an "unsatisfactory" in interpersonal skills.

Defendant Smith became Plaintiff's immediate supervisor in May, 1991. Defendant Smith prepared a Professional Improvement Plan for Plaintiff in order to assist Plaintiff in correcting some of the problems noted in the evaluation.

Plaintiff's next job evaluation in May, 1992 gave Plaintiff an overall rating of "unsatisfactory." On May 8, 1992, Defendants discussed Plaintiff's job evaluation with him and notified Plaintiff that his contract would not be renewed. Plaintiff did not respond to the evaluation when given the opportunity and took sick leave for the remaining six weeks of his contract.

Another Programmer/Analyst, likewise hired in 1986, also was not offered a new contract for the 1992-1993 year. This employee, Mr. Davisson, a white male, age 37 years, also had a problem with interpersonal skills and completing assigned projects.

On July 23, 1993, Plaintiff filed the instant Complaint in this Court, alleging: Count One - race discrimination under Title VII; Count Two - sex discrimination under Title VII; Count Three - age discrimination under the ADEA; Count Four - due process violation under 42 U.S.C. § 1983, and County Five - an equal protection claim under the Fourteenth Amendment. On May 10, 1994, Plaintiff filed an Amended Complaint adding a claim under 42 U.S.C. § 1981.[2]

[2] In this Amended Complaint, Plaintiff claimed that Defendants had treated him differently from white and female employees with respect to his employment contract. Defendants point out that Plaintiff failed to comply with Federal Rule of Civil Procedure 15(a) and Local Rule 220-1(a) of the Northern District of Georgia. However, the Court notes that the docket shows a verbal Order from the judge to whom this case was previously assigned, allowing Plaintiff to amend his Complaint. In any event, the Court notes that Plaintiff does not argue this Section 1981 claim in his Motion for Summary Judgment or in his Response to Defendants' Motion for Summary Judgment. However, since the analysis of this claim is substantially the same as for a claim of racial discrimination under Title VII, and in deference to Plaintiff's pro se status, the Court will consider Plaintiff's claim of discrimination under Section 1981.

II. DISCUSSION OF LAW

A. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) defines the standard for summary judgment as follows: courts should grant summary judgment when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The general rule of summary judgment in the Eleventh Circuit states that the moving party must show the court that no genuine issue of material fact should be decided at trial. Clark v. Coats & Clark, Inc., 929 F.2d 604, 606-09 (11th Cir. 1991). Unless the movant for summary judgment meets its burden under Federal Rule of Civil Procedure 56, the obligation of the opposing party does not arise even if no opposing evidentiary material is presented by the party opposing the motion. Clark, 929 F.2d 607-08.

While all evidence and factual inferences are to be viewed in a light most favorable to the nonmoving party, Rollins v. TechSouth, Inc., 833 F.2d 1525, 1529 (11th Cir. 1987); Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987), "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." Id. at 250. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. Id. at 248.

Where neither party can prove either the affirmative or the negative of an essential element of a claim, the movant meets its burden on summary judgment by showing that the opposing party will not be able to meet its burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). In Celotex, the Supreme Court interpreted Federal Rule of Civil Procedure 56(c) to require

the moving party to demonstrate that the nonmoving party lacks evidence to support an essential element of its claim. Thus, the movant's burden is "discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Id.

B. PLAINTIFF'S DISCRIMINATION CLAIMS

Plaintiff alleges claims under Title VII for race and sex discrimination, under ADEA for age discrimination, and under 42 U.S.C. § 1983 for race discrimination.[3] Title VII, § 1983, and the ADEA make it unlawful for an employer to discharge or otherwise discriminate against an employee because of the employee's race, sex or age, respectively. 42 U.S.C. § 2000e(a)(1), 42 U.S.C. § 1983, and 29 U.S.C. § 623(a).

1. Applicable Federal Law

Intentional discrimination can be proved by either direct, circumstantial or statistical evidence. Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir. 1989); Buckley v. Hospital Corp. of America, Inc., 758 F.2d 1525, 1529 (11th Cir. 1985); cf. McDonnell-Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973). The McDonnell-Douglas analysis set forth by the Supreme Court has been adopted by the Eleventh Circuit for use in ADEA cases and in § 1983 cases involving discrimination. Burns v. Gadsden State Community College, 908 F.2d 1512, 1518 n. 8 (1990) (citations omitted).

[3] Although Plaintiff does not allege an equal protection violation under Section 1983 for discrimination in his Complaint, the Court notes that Plaintiff seems to be arguing this type of claim in his Motion for Summary Judgment and his Brief in Response to Defendants' Motion for Summary Judgment. Liberally construing Plaintiff's Complaint, the Court also will analyze Plaintiff's claims of discrimination under Section 1983.

Direct evidence is that evidence which, if believed, "establishes discriminatory intent without inference or presumption." Clark v. Coats & Clark, Inc., 990 F.2d 1217, 1226 (11th Cir. 1993). "Only the most blatant remarks whose intent could only be to discriminate on the basis of age constitute direct evidence." Clark, 990 F.2d at 1226. See also Carter, 870 F.2d at 581-82. Evidence which only "suggests discrimination, leaving the trier of face to infer discrimination based on the evidence" is, by definition, circumstantial. Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081-82 (11th Cir. 1990) (emphasis in original).

The United States Supreme Court recently clarified the proper allocations of the burden of proof and the burden of production for evaluating claims of intentional discrimination based on circumstantial evidence. In St. Mary's Honor Ctr. v. Hicks, __ U.S. ___, 113 S.Ct. 2742 (1993), the Court explained that its decision in McDonnell-Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), prescribed the following approach for courts to follow in addressing the merits of a discrimination claim: If the plaintiff establishes a prima facie case, it creates a presumption that the defendant unlawfully discriminated against the plaintiff. Hicks, 113 S.Ct. at 2747 [citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-56, 101 S.Ct. 1089 (1981)]. The presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case. Id. Although the burden of production shifts to the defendant upon the establishment of a prima facie case, the ultimate burden of persuasion -- that the defendant intentionally discriminated against the plaintiff -- never leaves the plaintiff. Id. If the defendant is able to produce evidence that the adverse actions were taken for "legitimate, nondiscriminatory reasons," the prima facie case is rebutted, and the plaintiff carries the full burden at trial of persuading the trier of fact not only that each of the defendant's proffered explanations is pretextual, but that the defendant intended to discriminate against the plaintiff. Id. at 2749. ("[If] the defendant has succeeded in carrying its burden of production, the

McDonnell-Douglas framework -- with its presumption and burdens -- is no longer relevant.")

If the defendant is able to meet its burden of production, "the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]'..." Hicks, 113 S.Ct. at 2749. "The factfinders disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." Id. (emphasis added). However, in contrast to some courts' previous interpretations, rejection of the defendant's proffered reasons does not alone compel judgment for the plaintiff. Id. This is because the burden of persuasion rests always with the plaintiff.

On a motion for summary judgment, the shifting burdens accompanying such a motion are grafted onto the shifting burdens of the McDonnell-Douglas/Burdine/Hicks analysis. To survive summary judgment, the plaintiff must then present concrete evidence in the form of specific facts which show that the defendant's proffered reason is mere pretext. Mere conclusory allegations and assertions will not suffice. Early v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990). Once Defendant has come forward with legitimate reasons for the termination, the burden shifts to the Plaintiff to show that the employer's proffered reasons for discharge are unworthy of credence or that a discriminatory reason more likely motivated the employer. Mauter v. Hardy Corp., 825 F.2d 1554, 1558 (11th Cir. 1987). The Court will discuss below the resulting burdens of proof and production.

2. Plaintiff's Prima Facie Case

Plaintiff has not introduced any direct or statistical evidence of sex, race, or age discrimination. Therefore, Plaintiff must

make out a prima facie case of discrimination with circumstantial evidence. In cases based on circumstantial evidence, the plaintiff makes out a prima facie case for discrimination if he shows: "(1) that he belongs to a protected class; (2) that he was qualified for the position which he held; (3) that he was discharged and replaced by a person outside the protected class or that he was discharged while a person outside the protected class with equal or lesser qualifications was retained. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Lee v. Russell County Board of Education, 684 F.2d 769, 773 (11th Cir. 1982).

Defendants contend that Plaintiff cannot make out a prima facie case for discrimination because Plaintiff was not replaced and Defendants did not search for a replacement for Plaintiff. Defendant Keegan has stated in his affidavit that Plaintiff's position was not filled after Plaintiff's contract expired and no effort was made to fill the position. Keegan aff. para. 8. In addition, Defendants argue that Plaintiff cannot show another employee, whether white, female, or younger, who engaged in similar conduct or who had equal or lesser qualifications and yet was retained.

Plaintiff alleges that other employees were treated differently and names the following employees in support of his claim of disparate treatment: Ricky Gaines, Sherry Bell, Robert Tzeng, Walter Matlock, Randall Cason, Richard Brooks, John Bower, and Valerie Williams. Plaintiff states that Ricky Gaines, who is under age 40, was promoted to a Programmer - I position. Plaintiff states that Valerie Williams, also under age 40, was hired as a Programmer - II on June 1, 1992. However, Plaintiff gives no more facts as to these two employees. Plaintiff does not show any nexus between the Board's decision to hire and promote these employees and Plaintiff's employment situation. Plaintiff does not show how he and these employees were similarly situated or how their qualifications and experience were comparable to Plaintiff's qualifications and experience.

Plaintiff claims that Walter Matlock, Randall Cason, Richard Brooks and John Bower, all younger, white males, were responsible for Plaintiff's being cited with a memorandum for "Timeliness of Work" Plaintiff claims that he could not do his work because these four men had not done their work. However, Defendants content that this memo was not the basis for Defendants' decision to terminate Plaintiff, and, in any event, there is evidence that these employees were unable to get help from Plaintiff in resolving problems with Plaintiff's programs.

Plaintiff alleges that Robert Tzeng, a younger Chinese man, also received an unsatisfactory evaluation, but was given an opportunity to improve his performance.[4] However, Plaintiff also received evaluations in 1990 and 1991 in which areas where improvement was needed were noted. In addition, Plaintiff was given an improvement plan in 1991, thereby being put on notice of problems and also being given an opportunity to improve his job performance.

Plaintiff claims that Sherry Bell, a white female employee aged 52, was placed on 90-day probation instead of being terminated. However, Plaintiff has not even identified Ms. Bell's misconduct and, therefore, the Court cannot make any determination as to whether Ms. Bell's and Plaintiff's situations and conduct were similar.

The Court finds that while Plaintiff has identified these employees as receiving allegedly more favorable treatment than Plaintiff, Plaintiff has not shown any similarity as to conduct or employment situation between Plaintiff and these other employees. Therefore, the Court finds that Plaintiff has not submitted enough evidence to make out a prima facie case of discrimination. There

[4] It should be noted that there was never a decision as to whether or not to terminate Mr. Tzeng. Mr. Tzeng received his unsatisfactory evaluation in February, 1991, and resigned in March, 1991

is no evidence that Plaintiff was replaced at all, and certainly not with a younger, female or white employee of equal or lesser qualifications. Further, Plaintiff has submitted no evidence tending to show that someone white, younger, or female engaged in similar misconduct and was retained. Indeed, Defendants have shown that Mr. Davisson, a younger, white employee, was similarly situated to Plaintiff in that Mr. Davisson was hired in 1986, was cited for poor job performance and conduct in 1992, and also did not have his contract renewed for the 1992 fiscal year.

3. Defendants' Non-Discriminatory Reasons for Termination

However, assuming arguendo that Plaintiff has made out a prima facie case, the Court finds that Defendants have introduced sufficient evidence of legitimate, non-discriminatory reasons for Plaintiff's termination to rebut any inference of discrimination that Plaintiff may have raised. Defendants have submitted evidence that Plaintiff became easily upset over disagreements with co-workers, screamed at co-workers, threw things around after disagreements with co-workers, and frightened co-workers. For instance, Ms. Celestine Tory, an African-American female and Systems Analyst in the MIS department, wrote a memo to Dr. Fox, Superintendent of the School Board, stating that Plaintiff had started throwing things around while she was in his office and then followed her to her office yelling at her. Ms. Tory stated that Plaintiff's conduct frightened her.

Also, Alan Anderson, another African-American, wrote memos to Defendants about Plaintiff's volatile and uncooperative attitude. In addition, Mr. Anderson wrote a memo stating that he had serious reservations about the quality of the requisition program Plaintiff was developing.

In addition, Defendants have shown that Plaintiff's work on the requisition processing system was inadequate. Also, there were several incident reports generated when programs were being "cut-over" or converted to another system and there were a disproportionate number of problems generated by Plaintiff's programs. In short, Defendants have shown legitimate, non-discriminatory reasons for Plaintiff's termination.

4. Pretext

Once Defendant has articulated legitimate non-discriminatory reasons for the termination, the burden is then on Plaintiff to present "significant probative evidence that the articulated reason is merely a pretext for discrimination." Elrod v. Sears, Roebuck and Co., 939 F.2d 1466, 1470 (11th Cir. 1991). Plaintiff may do

this either by showing that Defendants' reasons are not worthy of credence or that race, sex, or age was more likely than not the motivating factor in Defendants' decision to terminate Plaintiff. Id.

Plaintiff claims that these reasons advanced by Defendants are pretextual. Plaintiff refers to the depositions of numerous employees in which Plaintiff inquired as to any problems these employees may have had with Plaintiff's interpersonal skills. Most of the employees questioned replied that they did not have any problems with Plaintiff. However, this does not rebut the fact that other employees did have problems with Plaintiff. For example, Plaintiff did not take the deposition of Mr. Anderson, who had problems with Plaintiff's interpersonal skills. Also, in her deposition testimony, Ms. Tory states that there were not only problems with Plaintiff's interpersonal skills, but also with Plaintiff's job performance.

Plaintiff claims that other employees also received incident reports for inferior work performance but were not terminated. However, Defendants point out that even though Defendants offered to produce these incidents reports for Plaintiff, Plaintiff never looked at them. Therefore, this conclusory allegation is without merit.

Further, Plaintiff claims that if his work performance did decline, it was due to stress induced by the Improvement Plan issued to him. Plaintiff's Briefs contain numerous pages which explain in detail how Defendants were mistaken in their assessment of Plaintiff's job performance. Plaintiff attempts to show how none of the problems associated with the Requisition Processing System was attributable to Plaintiff.

For example, Plaintiff states that some personnel working on the project resigned. One of these people was replaced by someone who changed the security system that his predecessor had developed. This in turn caused a delay that was not Plaintiff's fault. As previously discussed, Plaintiff claims that he could not

do his job because several other employees were not doing their jobs in a timely manner. However, this argument is one which merely alleges that Defendants were incorrect in their evaluation of Plaintiff's job performance. Even assuming that Defendants were mistaken as to Plaintiff's job performance this does not state a claim for discrimination under Title VII. "Title VII is not a shield against harsh treatment in the workplace." Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984) (quoting Jackson v. City of Kileen, 654 F.2d 1181, 1186 (5th Cir. 1981)). "The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Id.

Finally, Defendants stress Plaintiff's deposition testimony in which Plaintiff was unable to provide any evidence that race, sex, or age was the real reason for Plaintiff's termination. When asked if he had any evidence whatsoever of discrimination, Plaintiff made only conclusory allegations as to discrimination. Sanders dep. at pp. 74-92, 148-156, 185-192.

In conclusion, the Court finds that Plaintiff has failed to make out a prima facie case of discrimination. Even if Plaintiff were found to have made out a prima facie case, Defendants have submitted evidence showing that there were legitimate, non-discriminatory reasons for Plaintiff's termination, and Plaintiff is unable to show that these reasons are but a pretext for discrimination. Further, Plaintiff cannot show any discriminatory pattern or practice by Defendants. Other employees, Ms. Tory and Mr. Anderson, also African-American and over 40, were hired and promoted, while a younger, white employee's contract was not renewed. The Court finds that Plaintiff has not come forward with any evidence tending to show discriminatory animus on the part of Defendants. Thus, the Court grants summary judgment to Defendants on Count One, Count Two, and Count Three of Plaintiff's Complaint.

C. PLAINTIFF'S DUE PROCESS CLAIMS

Plaintiff brings a claim under 42 U.S.C. § 1983, alleging that Defendants violated his procedural and substantive due process rights when they did not renew his employment contract. As to any substantive due process claim which Plaintiff may have stated, the Eleventh Circuit has expressly held that: "areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because 'substantive due process rights are created only by the Constitution.'" McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994) (quoting Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 229 (1985)). Therefore, the Court will review Plaintiff's claim only as to any alleged procedural due process rights.

In order to state a claim for procedural due process, Plaintiff must show that he had a property interest in continued employment and tat Defendants deprived him of that property interest without due process of law. Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 538 (1985). Whether or not Plaintiff has a property interest in continued employment "is determined by considering whether under state law, the employee could be fired only for cause." Brown v. Georgia Dept. of Revenue, 881 F.2d 1018, 1026 (11th Cir. 1989).

Plaintiff was not terminated during the term of his contract and, therefore, Plaintiff does not claim that his employment contract created a property right. However, Plaintiff claims that the School Board's "Administrative Procedure, GBK/GBN - Professional Terminations/Suspensions") ("Administrative Procedure") creates a property interest which gives rise to procedural due process rights. This Administrative Procedure provides that "[b]efore the discharge or suspension of any teacher, principal or other employee having an employment contract for a definite term, the following rules of procedure must be observed." The Administrative Procedure then specifies that when a decision is made not to renew an employee's contract, "written notification

of such intention shall be given to the teacher or other employee by April 15 prior to the ensuing school year." The Administrative Procedure provides that if written notice is not given by April 15 of the intent not to renew the employee's contract, then the employment of the teacher or other employee shall be continued through another school year. Plaintiff contends that he is entitled to have his contract renewed for another year unless Defendants content that "cause" existed for nonrenewal, in which case, Plaintiff contends that he is entitled to an adversarial hearing in order to contest the sufficiency of the reasons given for nonrenewal.

Defendants contend that this Administrative Procedure is not applicable to Plaintiff because Plaintiff is not a certified employee. Plaintiff relies on language in the predecessor to the current Fair Dismissal Act, 1974 Ga. L. p. 1104, as authority for his contention that the Administrative Procedure in question should apply to non-certificated employees. However, Defendants point out that this law was amended in 1975 to make clear the intent that notice of nonrenewal by April 15 was applicable only to certificated employees. 1975 Ga. L. p. 360. Plaintiff then argues in his Response Brief that the plain language of the Administrative Procedure does not state that it is only applicable to certificated employees.

However, Defendants submit the affidavit of Dr. Lavender, the School Board's Associate Superintendent for Human Resources, who states that Administrative Procedure GBK/GBN was adopted in order to implement O.C.G.A. 20-2-211 which provides that certificated employees must be notified by April 15 of any intention not to renew their contract for the next school year. O.C.G.A. 20-2-211(b). Further, Dr. Lavender states that the Board's Policy Manual is divided into sections. The "GB" section contains provisions applicable only to certificated employees. The "GC" section is applicable to classified staff. Lavender Aff. para. 6. This is the standard coding system developed by the National School Board Association. Therefore, GBN/GBK is in the section of the Policy Manual which deals only

with certificated employees and therefore there would not necessarily be any reason to state that it applied to certificated employees within the text itself.

Further, reference is made in the Administrative Procedure to a contract for the "school year." This is not applicable to Plaintiff, who was not employed for the academic year, but for the fiscal year. Plaintiff's contract ran from July to June. Mr. Lavender also states in his affidavit that GBN/GBK has never been applied to any but certificated employees and no employees other than certificated employees have ever been given notice of nonrenewal.

In light of the above, the Court finds that Administrative Procedure GBN/GBK applies only to certificated employees. The language of GBN/GBK tracks the language of O.C.G.A. § 20-2-211 which applies only to certificated employees. The Administrative Procedure is located in that portion of the Policy Manual referring only to certificated employees, and, lastly,it has never been interpreted as referring to non-certificated employees and non-certificated employees have never been given notice of nonrenewal pursuant to this Administrative Procedure.

The court finds that Administrative Procedure GBN/GBK refers only to certificated employees whose contracts are for the academic or school year. Thus, when Plaintiff's 1990-1991 contract expired, Plaintiff no longer had a property interest in his employment. Since there was no property interest created in continued employment, Defendants did not violate Plaintiff's due process rights when they did not give Plaintiff notice of nonrenewal by April 15. Therefore, the Court grants summary judgment to Defendants on Count Four of Plaintiff's Complaint.

D. PLAINTIFF'S EQUAL PROTECTION CLAIM

In his Complaint, Plaintiff alleges that certain employees were given appeal hearings and/or notice of nonrenewal of their employment contracts while Plaintiff was not afforded a hearing or

notice. Plaintiff appears to be arguing that Defendants violated the Equal Protection Clause by not affording Plaintiff any procedural due process. The Court already has discussed this issue in detail under Plaintiff's due process claim and found that Defendants did not violate Plaintiff's right to due process.

The Equal Protection Clause is violated when similarly situated persons are treated differently and that different treatment is not rationally related to a legitimate state interest. City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432, 439-40 (1985). The Court already has found that Plaintiff was not similarly situated with employees who were afforded notice or a hearing because these employees were certificated employees and Plaintiff was not a certificated employee. Further, Dr. Lavender has stated in his affidavit that non-certificated employees were never afforded notice of nonrenewal. Therefore, Plaintiff cannot show that he was similarly situated with employees who were treated differently.

Further, even if Plaintiff could show that he was being treated less fairly than other similarly situated employees, Plaintiff cannot show that this Administrative Procedure was not rationally related to a legitimate state interest. Defendants have stated that this Administrative Procedure was adopted in order to comply with O.C.G.A. 20-2-211 which only applies to contracts of certificated employees for the period of the school year. This is certainly a rational basis for adopting this Administrative procedure. Therefore, since Plaintiff was not similarly situated with employees who were afforded notice of nonrenewal and since Plaintiff has submitted no evidence that this School Board Administrative Procedure was not rationally related to a legitimate state interest, Everett v. Napper, 833 F.2d 1507, 1514 (11th Cir. 1987), the Court grants summary judgment to Defendants on Count Five of Plaintiff's Complaint.

E. QUALIFIED IMMUNITY

"Qualified immunity protects government officials performing discretionary functions from civil trials (and other burdens of litigation, including discovery) and from liability of their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" Lassiter v. Alabama A & M Univ., 28 F.3d 1146, 1149 (11th Cir. 1994) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). The Court need not reach the issue of whether Defendants are entitled to qualified immunity on Plaintiff's claims because the Court does not find that Defendants' actions rose to the level of a Constitutional violation. Menuel v. City of Atlanta, 25 F.3d 990, 997 (11th Cir. 1994). However, even if the Court were to find that Defendants had violated Plaintiff's Constitutional rights, there is no showing that Defendants violated a clearly established right of the Plaintiff. Rodgers v. Horsley, 39 F.3d 308, 310 (11th Cir. 1994) (once defense of qualified immunity is raised, Plaintiff bears the burden of showing that the federal rights violated were clearly established). Plaintiff has submitted no evidence tending to show that the School Board members should have known that they were violating clearly established Constitutional rights when they did not renew Plaintiff's contract. Rodgers v. Horsley, 39 F.3d 308, 310 (11th Cir. 1994). Therefore, even if Plaintiff were to prove a violation of his Constitutional rights, the Court finds that Defendants are entitled to qualified immunity from suit in their individual capacities on Plaintiff's claims.

E. PLAINTIFF'S 42 U.S.C. § 1981 CLAIM

As previously noted, Plaintiff brought this claim in an Amended Complaint. Plaintiff alleges that he was treated differently from white and female employees in connection with his employment contract. Plaintiff does not argue this claim in his Motion for Summary Judgment or in his Brief in Response to Defendants' Motion for Summary Judgement. In any event, the same substantive analysis applies to a discrimination claim under § 1981 as to a discrimination claim under Title VII. Clark v. Cit

y of Macon, 860 F.Sup. 1545, 1552 (M.D. Ga. 1994); Cabiness v. YKK (USA), Inc., 859 F.Sup. 582, 588 (M.D. Ga. 1994). The Court has already analyzed Plaintiff's claims under Title VII and has granted summary judgment to Defendants on these claims. Therefore, on those same grounds, the Court grants summary judgment to Defendants on Plaintiff's § 1981 claim, Count VI of Plaintiff's Complaint.

CONCLUSION

For the reasons discussed above, the Court DENIES Plaintiff's Motion for Summary Judgment [29-1] and GRANTS Defendants' Motion for Summary Judgment [30-1]. The Court DIRECTS the Clerk to enter final judgment in favor of Defendants on Plaintiff's Complaint and Plaintiff's Amended Complaint.

IT IS HEREBY ORDERED, this 30th day of March, 1995.

FRANK M. HULL
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

ALVIN J. SANDERS,

Plaintiff-Appellant,

v.

FULTON COUNTY BOARD OF EDUCATION, JAMES FOX, JAMES SMITH, JOHN KEEGAN, ZENDA J. BOWIE, MICHAEL T. RAST, FRANK C. LAMBERT, EDWARD E. LEWIS, SANDI A. MALONEY, DELORES G. McGHEE, BARBARA S. DUFFY, KAREN J. WEAVER, JEANNETTE BRAINE-SPERRY, LINDA P. BRYANT, JANET E. FORBES, VICKIE F. HANSBERGER, in their individual and official capacities,

Defendants-Appellees

Appeal No. RE: 95-8544
District Court No. 1:93-CV-1668-FMH

APPELLANT'S
RESPONSE TO APPELLEES' BRIEF

APPELLANT'S RESPONSE BRIEF

The Appellees stated "Plaintiff does not appear to argue that the District court erred in its Statement of the Governing Principles of Law" in that the Principles of Law cannot be based upon fraudulent documents and non-credible witnesses. Appellant's argument is based precisely on the Governing Principles of Law. Appellant clearly understands Appellant's limited abilities, within the rules of courts, to adequately protect Appellant's constitutional and civil rights. Because of that limitation, the Federal Court is not excused to ignore Appellant's constitutional and civil rights, nor is the Federal Court excused to ignore the evidence submitted by Appellant in the protection of those rights. Therefore, Appellant pleads passionately to the Eleventh Circuit Court of Appeals to be reminded that the constitutional and the civil rights of Appellant have not been lessened by Appellant's Pro Se representation. On page 8 of the Brief of Appellees to the Court, the Appellees stated, "Plaintiff now claims that all these documents are "Fraudulent," that they evidence a massive conspiracy to discriminate against him on the bases of race, sex and age. His argument in this regard is so preposterous that the District Court did not even attempt to address it." From the previous statement, it can be seen that the Appellees believe that the District Court thinks that it is preposterous for a pro se litigant to perform discovery that would produce proof that the Appellees and their witnesses were not credible. Therefore, the District court can simply ignore the Pro Se litigant's constitutional and civil rights by ignoring the evidence submitted by the Pro Se litigant. The failure of the District Court to even consider the Appellant's argument, regarding Appellees' fraudulent documents did great damage to the United States Constitution. The United States Court of Appeals for the Eleventh Circuit must restore the United States Constitution to a meaningful and enforceable document. The United States Court of Appeals for the Eleventh Circuit must say to these Appellees that it is not preposterous for the Appellant to present to the District Court evidence in the form of direct sworn testimony from nineteen credible witnesses, six of whom were identified as witnesses for the Appellees; also twelve of nineteen witnesses

worked in the M.I.S. department, that testified to the fact that they had not experienced any interpersonal or working problems with Appellant.

It is not preposterous for testimony from nineteen credible witnesses to cause the defense to concede to make the statement at R2-30 Pages 13 footnote 7, "No doubt plaintiff will emphasize that may of the "users" of his program and the staff at M.I.S. with lower rank had not observed his displays of anger and had not experienced difficulty in working with him...". It is not preposterous that the testimony of the nineteen credible witnesses and the statement made by the defense proves the statement. (at R1-29 Exhibit 10)"...During this time I have witnesses Alvin accuse co-workers of sabotaging his work, violently throw objects around his office after minor disagreements with co-workers and scream uncontrollably when people disagree with him about work related issues..." to be an outright lie.

It is not preposterous that the Appellees knowingly and willfully submitted a document to the EEOC that contained a lie. It is not preposterous that by knowingly and willingly submitting the document with the proven lie to the EEOC, Appellees violated Title 18-Crimes and Criminal Procedures, Chapter 47 - Fraud and False Statements, Section 1001 - Statement or Entries Generally. The Appellees submitted the document to the EEOC. Therefore, the Appellees violated the law and therefore, the Appellees must be charged with criminal conduct. Mrs. Celestine Tory testified that she was the Author of the document. Therefore it was Mrs. Celestine Tory that lied. From the document it can be seen that Mrs. Celestine Tory has the capacity and the willingness to lie. At this point Appellant has proven that the Appellees and their star witness, Mrs. Celestine Tory are not credible people. Please see Appellant argument at R2-33 Pages 24-27 Section 4 and Appellant brief pages 17 thru 20 for arguments pertaining to the same document in question.

Appellant will present two aspects of those arguments now. Mrs. Celestine Tory stated in the document in question the

statement "...he began yelling at me very loudly and throwing objects about his office. Because his behavior was disturbing to me, I immediately left his office and returned to my desk..." Appellant shall refer to the previous statement as statement-A. In Mrs. Celestine Tory's deposition (pages 16 thru 17). Statement regarding the alleged incident went as follows:

Q. Okay. Tell me about incidents that allege that Mr. Sanders was screaming, yelling, and hollering at you?

A. Okay. It was on a Friday and we were in this room and I sat here (indicating), and your office was located here (indicating), this -- your door was open, and Dana sat in the office right behind yours, and Dana's door was open, and, as a matter of fact, at that time, he was speaking to Candice, and I had asked you something about the warehouse requisition processing system, about us getting it into production, and Doctor Keegan had spoken to both of us about it and he had wanted us to find out some information about the framer system, you and I didn't have knowledge of the framer system so I suggested to you that you talk to Richard Brooks about it, and I had suggested that to you on several occasions and you had not done that; and on this Friday, I said, after I had spoken to Doctor Keegan, I said, Alvin, why don't you talk to Richard about getting that information and I had come back and I was sitting at my desk and I was working on the terminal, and just all of a sudden you burst out of your office in a rage and you screamed and yelled at me about, I better not do this, and I better not ell you this, that, or the other, and I turned around and I said, Alvin, you need to calm down, and I told you that I was not going to talk to you about it until you did calm, and you went back and you sat down, and I think about a couple of minutes later you came back and you were yelling at me again, and you went back to your desk, and it was disturbing, two other people were in this office with me and they asked me if I was okay, and even Dana came from his office and he asked me if I was okay.

Q. Who wee the other people that asked you if you were okay?

A. Rhonda, Dana, and Thuc, she's oriental.

Q. You stated that you were working at your terminal and I approached you?

A. Yes.

Appellant shall refer to the previous statement as statement-B.

Now it can be clearly seen that statement A and statement B are different. In defense of Mrs. Celestine Tory, on page 12 of the Appellees brief the Appellees stated the descriptions of the incident had been provided at different times and different formats and fora (more than two years). Please notice in Mrs. Celestine Tory's statement she was very specific in providing the details of the alleged incident in her deposition. Mrs. Celestine Tory did not express any hesitation in recalling the details. Truth does not change over time. The Appellees had time to prepare Mrs. Celestine Tory for her testimony. Please be reminded that Mrs. Celestine Tory wrote the document. Given the evidence that Mrs. Celestine Tory's document (statement A) differ from Mrs. Celestine Tory's Testimony, it is not preposterous to conclude that Mrs. Celestine Tory's document is fraudulent.

The same document in question is dated March 13, 1992. In the document is the statement "for the safety of M.I.W. Employees, I think if Alvin's contract is not renewed he should be promptly escorted from the premises by security personnel once he is informed of this decision."

In support of Appellant fraudulent document argument, Appellant argues that Mrs. Celestine Tory is purposely trying to imply that on or before March 13, 1992, Mrs. Celestine Tory knew the Appellant's contract would not be renewed. Appellant argued in Appellant's brief, before the court (see pages 20-21), that the date of the document, March 13, 1992, conflicts with Mrs.

Celestine Tory's testimony. Mrs. Celestine Tory testified that when she first learned of the nonrenewal of Appellant's contract was few days before May 8, 1992. In defense of Mrs. Celestine Tory, Appellees called attention to Mrs. Celestine Tory's statement "...I don't think any where in here does it say that I'm aware of the fact that your contract was not going to be renewed...". Appellant's argument of inferences still stands. Please be reminded, the statement in question is "for the safety of M.I.S. Employee, I think if Alvin's contract...". Please see Appellant's argument at R2-33 page 30 and exhibit 87 at R2-33. Appellant's exhibit 87 is an e-mail document dated April 1, 1992, from Sherry A. Bell, supervisor computer operation M.I.S., contained in the document is the statement "Please be advised that system backups were not run 4/30/92 as Dr. Fox ordered the building vacated by all persons...". On April 30, 1992, there was a disturbance in the streets of downtown Atlanta. The disturbance was in response to the "Rodney King" trial verdict.

If the document in question was written on March 13, 1992, if everything in Appellees brief is true, if everything in Appellees John Keegan's and James Smith's affidavit is true, if Appellee James Fox would order the administration building vacated by all persons when there is a disturbance in downtown Atlanta (which is about three (3) miles away) and given the increase in violence in the work place, then it is not preposterous for reasonable men to believe that Appellee James Fox would have taken some kind of protective action to insure the safety of the M.I.S. Employees. There is nothing in the record that indicated Appellee James Smith took any actions to insure the safety of the M.I.S. Employees. Please Mrs. Celestine Tory's deposition pages 22, lines 17-23, page 23 lines 17-24. The testimony went as follows:

Q. Back to Plaintiff's Exhibit 10, were you aware of any follow up on your request to Doctor Fox as a result of your letter?

A. No.

Q. Although you suggested that Mr. Sanders was violent and subject to screaming and uncontrollable, did they provide you with any protection?

Ms. Pearson: At what point in time?

Mr. Sanders: At the time that they informed Mr. Sanders of his nonrenewal.

The Deponent: No.

Q. Do you find it strange that you would write the superintendent of schools and inform him of an impending dangerous situation, and they followed through with their intent and not provide you with any protection, or notice, or any protection.

Ms. Pearson: I'm no going to object to that on the grounds it's vague; I don't know what you mean by, did she find it strange.

By Mr. Sanders:

Q: Did Doctor Fox discuss this memorandum with you?

A. No.

Q. He did not?

A. No.

Q. So you don't know if he took it seriously or not?

A. No, I don't.

Given the evidence presented above, it is not preposterous for reasonable men to believe the document was written after May 8, 1992.

Date and Time Stamp.

(1) Please see at R1-29 Exhibit 9. Exhibit 9 is a document To: Jim Smith, From: Celestine Tort, cc: Alvin Sanders, Subject: Warehouse orders from May to July.

Please note in the upper right corner handwritten "file/sanders" and evidence of a date and time stamp.

(2) Please see at R1-29 Exhibit 12. Exhibit 12 is a document to: Walter L. Matlock, Director of Management Information System, from Charles Dennie McClure dated March 18, 1992, Re: Warehouse Requisition processing system concerns. Please notice in the upper right corner handwriting and evidence of a date and time stamp.

(3) Please see at R1-29 Exhibit 15. Exhibit 15 is a document identified by To: School Base Requisition Processing file, From: Alvin Sanders, Management Information System, date November 10, 1990, Subject: Warehouses, Inventory System School Bases Requisition Process Review. Please note the handwritten note and the evidence of a date time stamp (Nov. 13).

(4) Please see at R1-29 exhibit 27 - Exhibit 27 is appellant's employment contract for 07/01/92. Please notice the personnel records department date and time stamp.

(5) Please see at R2-29 Appellant exhibit 60. Appellant exhibit 60 is a document identified by "To: Jere Pruett, Executive Director Purchasing/Supply Services from: Alvin Sanders, Management Information Systems, Date: January 2, 1991, Subject: Warehouse inventory system school bases requisition process review. Please notice the handwritten note "1-3-91 ok, Alvin Where?" And the date and time stamp on the lower right side.

(6) Please see at R2-29 Appellant exhibit 84. Exhibit 84 is a document identified. By: "To: John Keegan, Associate Superintendent Instructional Sources., From: Alvin Sanders, Management Information Systems, Date: August 7, 1991, Subject:

Requisition Process System, Reference: Security Sign-Off. Please note the handwritten note signed by "Jack" and the date/time stamp in the upper right corner. This document was returned to Appellant with the handwritten note.

(7) Please see at R2-29 exhibit labeled as defendant's exhibit 1. Defendant's exhibit 1 is a copy of Appellant's Fulton County Board of Education Administrative/Professional Evaluation for the year 90-91. Please note the date/time stamp of the personnel records.

(8) Please see at R2-29 exhibit labeled as defendant's exhibit 2. Defendant's exhibit 2 is a copy of Appellant's Fulton County Board of Education Administrative/Professional Evaluation for the years 91-92. Please notice the date/time stamp of the personnel records.

From the above evidence, Appellant has demonstrated that by policy, habit and custom that the administrator of the Fulton County Board of Education stamps the Date & Time when documents are received by their departments.

While copies of original documents are acceptable, as evidence, it is not preposterous for reasonable men to conclude that although the document in question might be a copy of an original, it is not a copy of a document that was received by Appellee - James Fox or Appellee John Keegan. Therefore it is not preposterous for reasonable men to conclude that the document at R1-29 exhibit 10 is fraudulent.

Appellant has proven the document in question has four fraudulent aspects. With this one document, Appellant has proven the Appellees and their witness Celestine Tory are not credible. This document was submitted to the EEOC as exhibit 22 (see R1-29 exhibit 36). In violation of Title 18 Crimes and Criminal Procedure, Chapter 47 Fraud and False Statements, Section 1001 Statement or Entries Generally.

In their defense of Appellant's argument, Appellees argue, at Appellees brief page 7 footnote 6, "...but the program design error Ms. Tory identified was not related to the date the warehouse would close. Rather plaintiff had failed to design a means for handling the closure at all, whether the warehouse closed in May or after school ended..." The Appellees are dead wrong. first of all, Appellees have not presented any proof of their statement. Secondly the Requisition Processing System, the work in question, grew out of the Warehouse Inventory System. The Warehouse Inventory System was developed long before Mrs. Celestine Tory was hired at the Fulton County Board of Education, long before Appellee John Keegan was hired at Fulton County Board, long before Appellee James Smith was hired at Fulton County Board, long before Mr. Alan Anderson was hired at Fulton County Board of Education. Please see at R1-29 page 26 where Appellant stated "...shortly after Mr. John Keegan Jr. arrived to work for FCBOE.. after Mr. Keegan read the write up, submitted by the plaintiff, for the warehouse inventory system, Mr. Keegan met with the plaintiff to discuss the Warehouse Inventory System. During the discussion, Mr. Keegan suggested that it would be useful to the school personnel if the orders of school supplies could be placed directly in the warehouse inventory system. The discussion then centered on the possibility and difficulty associated with implementation for Mr. Keegan's idea..." Also please R2-29 exhibit 80. Exhibit 80 is appellant's status report to Appellee James Smith. Listed under accomplishments for June 24 to June 28, 1991, item 3 was the following accomplishments "3). Worked with the warehouse personnel in completing their year end process." From the status report for the week for June 24 - June 28, 1991, it can be clearly seen that the warehouse inventory system had a closing or year end processing capability. As stated before the requisition processing system was a means for the school personnel to place their orders for school supplies directly into the Warehouse Inventory System. Before there was a Requisition Processing System, the orders for school supplies were sent to the warehouse by school mail. Then the orders were entered into the Warehouse Inventory System by the warehouse personnel. Because, at time, there were functions that needed to

be performed by the warehouse personnel on the warehouse inventory system, the warehouse personnel had the capability to close, shut down or turn off the requisition processing system at anytime. In fact, the requisition processing system has to be opened for the school's use each day. No one can use the requisition processing system until it is opened by the warehouse personnel each day.

Please keep in mind, from exhibit 80 at R2-29, Appellant demonstrated that the warehouse closed for year end processing for th fiscal year July 1, 1990 through June 30, 1991, after school was closed. Now for Appellant's fraudulent document argument, Appellant alleges the Appellees knowingly and willfully misrepresented document at R1-29 exhibit 9 to the EEOC as work that was still required even after Appellant said the Requisition Processing System was completed. Please see R1-29 exhibit 33, page 2, reference to exhibit 15. Also, see Appellees exhibit list submitted to the EEOC at R1-29 exhibit 36. Appellant also alleged that Mrs. Celestine Tory committed perjury in her testimony while giving her deposition. Please see Tory's deposition pages 10 through 13. In response to question regarding exhibit 9; starting at page 10 line 135 the following testimony was given:

Q. What does that document have reference to?

A. It's the warehouse requisition system that we were -- it was still in test at that time, and part of my responsibility as system analyst was to review the system while it was in test before it moved to production to verify that problems, or -- if it was ready to put into production. These are things that I found wrong with the warehouse requisitioning system--

Mrs. Celestine Tory stated on page 12 line 24 the following "...Now, it was my understanding that this was part of the original request that you received from the warehouse to code this into the

warehouse requisition processing system; you did not code this in, initially and these are steps that you were going to take to code that in.

Please be reminded that the administrative offices of the Fulton County Board of Education operates on a fiscal year from July 1 through June 30th.

Now exhibit 9 (R1-29) is listed below:

February 26, 1992

To: Jim Smith
From: Celestine Tory

CC: Alvin Sanders

Subject: Warehouse orders from May to July

Th following changes will be made to the Requisition Processing System to handle warehouse orders during the months of May through June:

On-line

WI001A

1) The main menu will be changed to add the new option for next fiscal year's orders.
2) For next year's orders no account number verification will be done.
3) A new screen will be added to alert System users that he regular ordering process will not be available until July and the only option available from May through July 1 is the next fiscal year option.

WI101A

1) Will not display current account balance when next year's orders are placed.
2) When orders are displayed for reactivation current orders will be distinguished from next year's orders.

WI102A

1) Next year's orders will be written to the Orders Holding file.
2) When orders are released by the account owner, the order records will be rewritten to

the Holding file under the ID of the warehouse.

3) Items ordered for next year fiscal year cannot be moved to the current year's orders and vice versa.

WI112A

1) This new program will allow warehouse personnel to release next year's orders from the Holding file as they are filled.

2) All items released to be credited to next year's budget will be flagged as complete.

Batch

WI800A

1) This program will list all order on the Holding file. This program can also be used to give Warehouse personnel as indicator as to which items should be stocked.

WI810A

1) This program will print picking tickets for all completed (released) items on the Holding file. The account number and account balances will be verified in this program. For all orders passing the above checks a FAMIS transaction will be created, the inventory file will be updated, a warehouse shipping record will be created and the order will be deleted from the Holding file.

Exception reports will be generated for all orders with invalid account numbers and insufficient funds.

The Change Schedule is listed below:

TASK	Completion Date
Complete On-line changes	March 13, 1992
Test On-Line changes	March 17, 1992
Final Review of on-line changes	April 03, 1992
Batch Coding complete	April 13, 1992
In-house System Test	April 14, 1992
Documentation Complete	April 15, 1992
System Test with Marie Ross	April 16, 1992
System Revisions	April 21, 1992
Move Programs to Production	April 27, 1992

Now it can be clearly seen that the "warehouse orders from May to July" document is a detail of charges that had to be made to the requisition processing system so that orders for supplies for th next fiscal year may be entered and held until the current fiscal year ends. Contained in Doctor Larry Houston's deposition is the following testimony (page 5 line 5):

Q. When did you make -- Mr. Pruett testified earlier that -- if the warehouse were to be closed from may through June that would have been your decision; when did you decide to close the warehouse for the months of May and June?

MS. PEARSON: And, what year?

BY MR. SANDERS:

Q. For 1992.

A. That's for inventory purposes.

Q. I said--no, when was the decision made --

A. Oh, when was it made?

Q. Yes, what date.

A. Sometime in April -- if I remember correctly, it was in April, and that was a decision made by Mr. Jere Pruett and myself.

Q. Okay. Usually when you close the warehouse, the warehouse is closed after school ends, is that not true, for inventory purposes?

A. Yes. Actually, let me -- let me clarify that; the warehouse is not literally closed; we do close the inventory stock program for inventory, but we do allow it to stay open for ten stand point pending any emergency item that is needed by either the schools for summer school purposes, or the administrative offices.

MR. SANDERS: Okay. Thank you very much.

MS. PEARSON: Let me ask you some questions about that.

REDIRECT EXAMINATION

BY MS. PEARSON:

Q. When it closes -- well, let's focus on 1992; when it closed how long did it close for?

A. We -- it was decided -- now, also at the same our warehouse inventory stock program was closed down, Jere Pruett also closes down the requisitions and filling purchases order in the purchasing department, which -- and we felt, at the time, that following his lead as far as closing down his operation it would be a good time to close ours down also so that we could get caught up not only in filling what orders we had left in the program which already been established, but also getting

caught up in our receiving section of the warehouse which gave us more manpower there.

RECROSS-EXAMINATION (at page 10, line 14)

BY MR. SANDERS:

Q. In order to better coordinate our activities you said, this year, for 1994, you closed on May 13th; you vary your closing times, do you not?

A. Yes.

MS. PEARSON: You mean, from year to year

THE DEPONENT: Yes.

MR. SANDERS: Thank you.

Proof of Appellant's allegations can be found in Appellee's brief to the Court of Appeals on page 4. Appellees states "...After several months of general discussions and planning, on July 31, 1990, defendant Keegan, Associate Superintendent for Instructional Services, assigned plaintiff a project which became know as the Warehouse Requisition Processing system... "from the previous statement, it can be clearly seen that there was not a request from the warehouse. Therefore, Mrs. Celestine Tory was dead wrong when she stated "...was part of the original request you received from the warehouse..." For other proof please, see R2-29, exhibit 81. Exhibit 81 is an E-mail from Appellee John Keegan, to Appellant Alvin Sanders, Celestine Tory, Appellee Jim Smith, dated 7/18/91, time 19:09, subject: n-line warehouses implementation plan. The document contained the following:

After the demo of the on-line warehouse system I asked for an implementation plan which would address the following:

Screen review by users
Testing of the product on the test side by a few users
Sign off of the system functioning by Jere Pruett and the warehouse personnel (Marie)
Sign off of the security to Harold Grindle and Jere Pruett
Date of movement to production (August 1st)
Amount of time and who would pilot the system on the production se
Implementation time line to schools and other departments
User documentation type and when ready
Who would conduct the training (Patty and Marie??)
Other areas that you consider important to put into the plan.

It has been three weeks since the demo.

From the above implementation list of Appellee John Keegan's e-mail, it can be clearly seen that Appellee John Keegan was very specific about the things he wanted done. It can also be clearly sen that Appellee John Keegan did not mention anything about "closing the Warehouse", nor the "Warehouse Orders from May to July". It can also be clearly seen that Appellee John Keegan did not mention anything about correcting or fixing error nor problems. Computer systems are not implemented with known problems. Also please notice a copy of the e-mail was sent to Mrs. Celestine Tory and the date of the e-mail is July 18, 1991. The date of Mrs. Celestine Tory's document is February 26, 1992. The time lapse between Appellee John Keegan's e-mail and Mrs. Celestine Tory's document is more than six (6) months. Also please see Appellant's exhibit 58 at R2-29. Exhibit 58 is an Inter-Office Communication to Appellee John Keegan from Appellant Alvin Sanders, dated January 2, 1991, Subject: Warehouse Inventory System - School Base Requisition Process Review. In exhibit 58 Appellant stated, "As promised Jack, the School Base Requisition Processing Program is ready for implementation. As per your request, a meeting has been scheduled with Jere Pruett and Marie Ross from the Warehouse...". Appellee John Keegan returned exhibit 58 to Appellant with a hand written note that stated: "To; Alvin, From Jack, This is great news please get with

me next week to demo and discuss implementation...". From exhibit 58, it can be clearly seen that Appellant is coordinating all of Appellant activities regarding the Requisition Processing System with Appellee John Keegan and not the Warehouse personnel. It can also be seen from exhibit 58 that Appellant involved the Warehouse personnel as early a January 2, 1991. Please see Appellant's exhibit 60 at R2-29. Exhibit 60 is an Inter-Office Communication to Jere Pruett, Executive Director Purchasing/Supply Services, from Alvin Sanders (appellant), dated January 2, 1991, Subject: Warehouse Inventory System - School Base Requisition Process Review. Appellant stated in exhibit 60, the following: "Please consider this as a request for a meeting on Friday, January 11, 1991, at 9:00 a.m. to discuss the implementation of the School Base Requisition Processing program. Attached please find a description of the program. I have scheduled a meeting with Marie Ross for Thursday, January 10, 1991 to review the program in its final form. I suggest that you talk with Marie in order to get a Warehouse view as to how this program will impact the Warehouse Inventory System and distribution process." Please note that Mr. Pruett returned exhibit 60 with a hand written note which stated "1-3-91 ok, Alvin where? Jere". It can be clearly seen from exhibit 60 that the Warehouse personnel are not the requestor of the Requisition Processing System. It can also be clearly seen from exhibit 60 that a determination of how the Requisition Processing System would impact the Warehouse Inventory System and the current distribution process had not been made, which clearly establishes the fact that the Warehouse personnel had not requested the Requisition Processing System. Thus proving Mrs. Celestine Tory's statement to be untrue. Please see Appellant exhibit 70 at R2-29. Exhibit 70 is an Inter-Office Communication, to Dr. Jack Keegan, From Jere L. Pruett, Executive Director of Purchasing and Supply Services, dated January 11, 1991, Re: Warehouse Inventory System. Mr. Pruett stated in exhibit 70, the following: "On Wednesday, January 10, 1991, I reviewed the program that Alvin Sanders has written to allow the direct entry of warehouse requisitions at User locations. I have been well pleased with the work Alvin has done on the entry system and feel it will work

satisfactorily...". It can be seen from the exhibit that the meeting requested in exhibit 60 did take place. It can also be clearly seen from exhibit 70 that he missing "Warehouse Order for May to July" function has not been detected. Thus proving the statement made by Mrs. Celestine Tory was not true. Please see Appellant's exhibit 86 at R2-29. Exhibit 86 is a document to Appellee Jack Keegan, From Appellant Alvin Sanders, cc: Jim Smith (appellee), Celestine Tory, dated August 12, 1991, Subject: Revised On-line Warehouse Implementation Plan. Exhibit 86 contains a list of activities, dates and comments. The second activity in the activity list is a "System Test", dated 08/02/91, comment: Marie Ross will test system. Marie Ross is the Marie mentioned by Appellee John Keegan above. From exhibit 86, it can be clearly seen that on or about August 2, 1991, Marie Ross was given a system test. Please note that Marie Ross' system test is the second activity on the implementation plan. It can be clearly seen from exhibit 86 that, in August 1991, Mrs. Marie Ross was given an opportunity to test the Requisition Processing System. it can also be clearly seen from exhibit 86 that if the Warehouse had requested the "Warehouse Orders from May to July" function, Mrs. Marie Ross would have discovered the missing function as early as August 1991. Thus proving the statement made by Mrs. Celestine Tort to be untrue. From the above argument, the Appellant's argument at R2-33, pages 21 & 22, and the Appellant's argument in Appellant's brief on page 14, Appellant has proven the representation of exhibit 9, by the Appellees to the EEOC as "...significant problems that had to be addressed and changes that had to be made ... (see memorandum from Celestine Tory to Jim Smith, exhibit 15)...", was a willful mis-representation of exhibit 9 to the EEOC in violation of Title 18, Crimes and Criminal Procedures, Chapter 47 Fraud and False Statement, Section 1001 - Statement of Entries Generally. The above mentioned arguments have also proven the following statement made by Mrs. Celestine Tory, under oath, regarding exhibit 9 to be untrue: (1)."...these are the things that I found wrong with the Warehouse Requisitioning System – ..." (Tory's deposition page 10, line 21), (2)"...these are problems that we found..." (Tory deposition page 11, line 12); (3)."...this was a part of the original request that you

received from the Warehouse to code this into the Warehouse Requisition Processing System: you did not code this in, initially, and these are steps that you were going to take to code that in,". If Appellant has proven the above statement made by Mrs. Celestine Tory to be untrue and if Mrs. Celestine Tory made those statements under oath, then Appellant has proven Mrs. Celestine Tory to be a perjurer. Other credible problems with the Appellees can be seen in Appellant's argument at R1-29 page 16 and exhibit 39 at R1-29, in the State of Georgia Department of Labor - Employment Security Agency Separation Notice form, "line 4. Reason for separation: ..."b. If for other than lack of work, state fully and clearly the circumstances of separation:", the Appellees response was "Assignment Completed 6/30/92". The previous statement conflicts with the statement the Appellees made to the EEOC. Either the Appellees lied to the Georgia Department of Labor, in violation of state law, or the Appellees lied to the EEOC in violation of federal law. By stating "Assignment Completed 6/30/92", suggested that the Appellees might have been trying to defraud the State of Georgia Department of Labor out of unemployment payments. If the Appellees could cast Appellant as a contract employee that had a contract to perform a specific assignment, then the Appellees would not have to pay unemployment benefits to the State of Georgia. There is ample room on the form ESA-800 to provide more details of the "Circumstances of the Separation".

Conclusion:

This case cries out for reversal. Appellant has demonstrated that the District court has lost its impartiality by finding evidence in support of the Appellees where there was none. The District court stated: "For example, Plaintiff did not take the deposition of Mr. Anderson, who had problems with Plaintiff's interpersonal skills." Appellant did take a deposition from Mr. Anderson, and there is nowhere in the record where Mr. Anderson expressed or implied that he had problems with Appellant's interpersonal skills. Also with the help of the Appellees, it has been demonstrated "that the District Court did not even attempt to address" the Appellant's

fraudulent document arguments. Appellant has proven Mrs. Celestine Tory to be a liar. Appellant has proven Mrs. Celestine Tory to be a perjurer. Appellant has proven that the Appellees lied to the Georgia Department of Labor. Appellant has proven that the Appellees submitted fraudulent documents to the EEOC. Appellant has not only proven that the Appellees' nondiscriminatory reason was a pretext, Appellant has not only proven that the Appellees' non discriminatory reason was unworthy of credence, but Appellant has proven that the Appellees' nondiscriminatory reason was rife with criminal misconduct.

For the above stated reasons, Appellant respectfully request this Court to reverse the decision of the District Court below granting Appellees summary judgment and grant Appellant Summary judgment.

Appellant asks this Court to make Appellant whole again by granting Appellant the following:

1. Reinstatement into the position of Programmer/Analyst with duties and responsibilities no less than those stated in his position's job description during my employment.

2. Full back pay from May 11, 1992 to settlement date.

3. Reinstatement of all credited service to be continued from December 1, 1986, as if there were no break in service.

4. Reinstatement of all continuous service, to be continued from December 1, 1986 as if there were no break in service.

5. Reinstatement of all sick leave benefits to be continued from May 11, 1992, as if there were no break in service.

6. Reinstatement of all vacation benefits to be continued from May 11, 1992 with a waiver of the maximum number of days that may be accrued, as if there were no break in service.

7. To be made whole with the Georgia Teacher Retirement System as follows:

   7a. Seek a waiver from the Georgia Teachers Retirement System of the requirements for and the re-purchase of the service time, plus interest, from December 1, 1986 to June 30, 1992.

   7b. The purchase of the service time plus interest from July 1, 1992 to settlement date.

8. To be made whole with the Fulton County Teacher Retirement System as follows:

   8a. Reinstatement into the Fulton County Teacher Retirement System.

   8b. Seek a waiver from the Fulton County Teachers Retirement System of the requirements for and the repurchase of service time, plus interest from December 1, 1986 to June 30, 1992.

   8c. The purchase of service time plus interest from July 1, 1992 to settlement date.

9. To be made whole with respect to a Tax Shelter Annuity I had with the Travelers Insurance company as follows:

   9a. That the balance of the account, at June 30, 1992, be brought forward by using the rate of growth plus the rate of monthly contributions per month from July 1, 1992 through settlement date.

   9b. That a waiver be obtained from the IRS for a one time contribution to a similar TSA for the amount calculated above.

10. Reimbursement for the difference in the health insurance premium paid by me.

11. Compensatory damages.

12. Punitive damages.

Respectfully Submitted,

_____

Alvin J. Sanders
Plaintiff - Appellant

1055 Coleman Street, SW
Atlanta, Georgia 30310
(404) 755-0717

APPENDIX H

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ALVIN J. SANDERS,

Petitioner,

v.

FULTON COUNTY BOARD OF EDUCATION, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

ALVIN J. SANDERS, PRO SE
PETITIONER
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ATLANTA, GEORGIA 30310
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APPENDIX H

THORNBROUGH V. COLUMBUS AND GREENVILLE R. CO.

I. FACTS

At the time of his discharge from the C & G Railroad, Thornbrough was fifty-six years old and held the position of Vice President of Federal projects. He had worked in the railroad business for approximately thirty-one years—the last five with the C & G Railroad, from 1977 to 1982. During this time, he held a variety of positions, including Assistant Chief Engineer, Vice President-Chief Engineer, Vice President of Transportation, and Vice President of Operations.

The C & G Railroad was established in 1975. From its inception, it was plagued with financial problems. Indeed, between the years 1975 and 1982, the Railroad made a net profit on only one year and accumulated net losses of $1.6 million. Its losses exclusive of real property gains totaled $3.58 million.

In 1982, the Railroad determined that in order to cut these losses, it had to reduce its work force. Between February and November 1982, the Railroad "furloughed" (that is, fired) forty-three employees. Including retirements, the Railroad's work force was reduced by forty-six employees, from 106 to 60. In addition, the Railroad went on a four-day work week, and management deferred payment of approximately ten percent of its own salary.

On June 30, 1982, the Railroad furloughed Thornbrough. Apparently, no one replaced Thornbrough in his position as Vice President of Federal Projects. Instead, his position was eliminated and its duties divided up among the Railroad's Chief Engineer, Accountant, and General Supervisor of Maintenance of Ways and Structures. These individuals were approximately forty-seven, thirty, and fifty-four years old, respectively. The Railroad also

retained several other younger employees in positions similar to Thornbrough's and hired two new employees with little railroad experience. The precise ages of these retained and new employees are somewhat unclear. At least one was clearly outside of the protected ADEA class at the time of Thornbrough's furlough,[1] and several others may also have been outside of the protected class.[2]

Thornbrough brought suit against the Railroad on February 11, 1983, alleging both a violation of the ADEA and breach of contract. In support of the ADEA claim, Thornbrough alleged that he was better qualified than the younger employees whom the Railroad retained and hired, including the three persons who assumed his former duties. According to Thornbrough, the fact that younger, less well-qualified employees were retained and hired in preference to him was evidence that the Railroad had discriminated based on age.

Following limited discovery, the district court granted the Railroad's motion for summary judgment on the ADEA claim on the ground that Thornbrough had failed to establish a prima facie case, and dismissed without prejudice Thornbrough's pendent state claim for breach of contract. Thornbrough now appeals.

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[1]Roger Bell was in his early thirties in 1982.

[2]Bruce Hanson and Donnie Sellars are now in their early forties, and may have been under forty in 1982.